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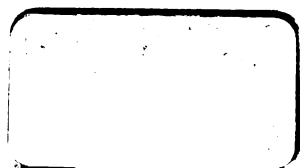
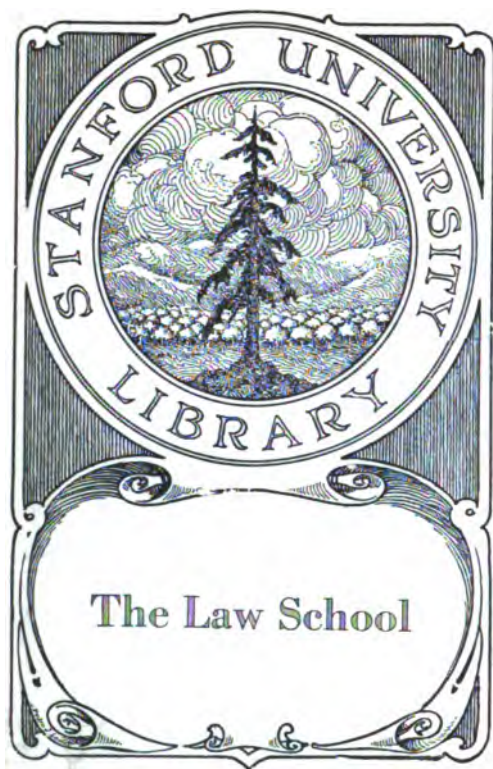
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*California News, 1877*

THE  
CIVIL PRACTICE ACT  
OF THE  
STATE OF CALIFORNIA,  
AS AMENDED, WITH  
NOTES AND REFERENCES,  
AND  
AN APPENDIX

CONTAINING  
THE ACT CONCERNING COURTS OF JUSTICE; THE ACT CONCERNING  
FORCIBLE ENTRIES AND UNLAWFUL DETAINERS; THE  
INSOLVENT ACT, AND THE RULES OF THE  
SUPREME COURT.

EDITED BY  
CHARLES H. PARKER, Esq.  
ATTORNEY AT LAW.

SAN FRANCISCO:  
H. H. BANCROFT AND COMPANY.  
1863.

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## P R E F A C E.

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THE desire of the Editor of the present edition of the Practice Act has been, not only to collate the various decisions bearing upon and construing the different sections of the Act, but to classify them in such a manner as to facilitate reference to them by the practitioner.

The general plan attempted to be followed is much the same as that pursued in Howard's and in Voorhies' editions of the New York Code. Where the provisions of our own Act are similar to those of the Code, the number of the corresponding section has been given. It is hoped that this will be found useful in consulting the decisions of that State relating to practice. The more important New York decisions rendered since the publication of the works of Howard and Voorhies, have been added under the appropriate sections.

Throughout the work those sections which are referred to in TITLE XVI, and made applicable to Justices' Courts, are marked "J. P."

As it is not always easy to draw definitely the line between what is law relating to practice purely, and that which pertains to the higher and more universal principles of jurisprudence, the Editor has preferred to be found rather too liberal than too strict in his annotations; for this reason it is not improbable that much matter will be found in this edition, which would have been omitted by others. But when it is considered that the design has been, as much as possible, to render the present work available for the whole profession as a book of ready reference, this will hardly be considered a serious objection, although adding somewhat to the size of the volume.

Errors, typographical and other, are to be found in all books. This will undoubtedly prove no exception. A few of the most important which have been discovered are noted.

SAN FRANCISCO, 10th February, 1863.

C. H. P.

# TERMS OF THE COURTS OF RECORD IN THIS STATE.

| COUNTY.        | DISTRICT COURTS.                                       | COUNTY COURTS.                                                                        | COURTS OF SESSIONS.                                                                | PROBATE COURTS.                                       |
|----------------|--------------------------------------------------------|---------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|-------------------------------------------------------|
|                |                                                        | 1st Monday in Jan., March, May, July, Sept., and Nov., unless otherwise fixed by law. | 1st Monday Feb., April, June, Aug., Oct., and Dec., unless otherwise fixed by law. | Monthly of each month, unless otherwise fixed by law. |
| Alameda,       | 3d Monday in July, Nov. and March.                     | 1 Mon. July, Oct. & Jan.; 3 Mon. Apr.                                                 | See County Court.                                                                  | See County Court.                                     |
| Amador,        | 1st Monday in Feb., June, August and Nov.              | 3d Mon. Jan., Mar., May, July, Sept. and Nov.                                         | See County Court.                                                                  | (Aug.; 2 Mon. Dec.                                    |
| Buena Vista,   | 3 (Attached to Tulare County)                          | 1st Mon. Jan., April, June, Aug. and Oct.                                             | 2d Mon. Feb.; 3d Mon. Apr.                                                         | 1 Mon. Feb. and May; 3 Mon.                           |
| Butte,         | 3 1st Monday in March, July and Nov.                   | 1st Mon. March and June; 2d Mon.                                                      | See County Court.                                                                  | See County Court.                                     |
| Calaveras,     | 1st Monday in January, April, July and October.        | 1st Mon. Jan., April, July & Oct.                                                     | 2d Mon. Mar., July and Nov.                                                        | See County Court.                                     |
| Colusa,        | 2d Monday in January; 1st Mond. May and Sept.          | 2d Mon. Jan., Mar., May, July, Sept.                                                  | See County Court.                                                                  | See County Court.                                     |
| Contra Costa,  | 4 1st Tuesday after 3d Monday in Jan., May and Sept.   | 3 Mon. May; 1 M. Aug. Nov. & Feb.                                                     | See County Court.                                                                  | See County Court.                                     |
| Del Norte,     | 11 2d Monday in May, August and Nov.                   | 1 Mon. Apr.; 3 M. July & Oct.                                                         | 1st Mon. Mar., July and Nov.                                                       | See County Court.                                     |
| El Dorado,     | 11 2d Monday in Feb. and May; 8d Mond. Aug. and Nov.   | 1 Mon. Jan., May and Sept. [and Dec]                                                  | 1 Mon. Feb., April, June, Aug., Oct.                                               | See County Court.                                     |
| Fresno,        | 3 1st Monday in March, July and Nov.                   | 2d Mon. Feb., April, June, Aug., Oct.                                                 | See County Court.                                                                  | See County Court.                                     |
| Humboldt,      | 8 1st Monday in March, June and Sept.                  | 1 Mon. Feb., May, Aug. and Nov.                                                       | See County Court.                                                                  | See County Court.                                     |
| Klamath,       | 7 2d Monday in April; 1st Monday Dec.                  | 2d Mon. Feb. and 3d Mon. April.                                                       | 4 Mon. Feb., 1 M. May, July.                                                       | See County Court.                                     |
| Lake,          | 1 3d Monday in March, July and Nov.                    | 1st Mon. Feb., May, Aug. and Nov.                                                     | See County Court.                                                                  | See County Court.                                     |
| Los Angeles,   | 7 1st Monday in March, July and Nov.                   | 2d Mon. Feb., May, Aug. and Nov.                                                      | See County Court.                                                                  | See County Court.                                     |
| Marin,         | 13 3 1st Monday in March, July and Nov.                | 1st Mon. Mar., June, Sept. and Dec.                                                   | See County Court.                                                                  | See County Court.                                     |
| Mariposa,      | 7 3d Monday in March, July and Nov.                    | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Merced,        | 10 1st Monday in January, May and Sept.                | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Monterey,      | 3 2d Monday in December, April and August.             | See Court of Sessions.                                                                | See County Court.                                                                  | See County Court.                                     |
| Napa,          | 7 1st Monday in February, June and Oct.                | 2d Mon. Mar., July, and 1 Mon. Nov.                                                   | 1st Mon. Apr., Sept. and Dec.                                                      | 3 Mon. Mar., June, Sept. and                          |
| Nevada,        | 11 1st Monday in Feb., Apr., June, Aug., Oct. and Dec. | 1st Mon. Jan., May and Sept.                                                          | 1st Mon. Mar., July and Nov.                                                       | 1 M. Jan. Mar. May, Jul. Sep.                         |
| Placer,        | 1 2d Monday in Jan., April, July; 8d Mond. Oct.        | 2d Mon. Sep., 4 Mon. Jan. and May.                                                    | See County Court.                                                                  | See County Court.                                     |
| Pumas,         | 1 2d Monday in April, July, Oct. and Jan.              | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Sacramento,    | 6 1st Monday in Feb., Apr., June, Aug., Oct. and Dec.  | 1st Mon. Jan., April, June & Sept.                                                    | 1st Mon. Feb., June and Oct.                                                       | See County Court.                                     |
| S. Bernardino, | 1 3d Monday in Feb., June and Sept.                    | 1st Mon. Jan., Mar., May, July, Sept.                                                 | See County Court.                                                                  | See County Court.                                     |
| San Diego,     | 4 2d Monday in Jan., May and Oct.                      | 1st Mon. Jan., Mar., May, July, Sept. [and Nov.]                                      | See County Court.                                                                  | See County Court.                                     |
| S. Francisco,  | 12 1st Monday in Feb., Apr., June, Aug., Oct. and Dec. | 1st Mon. Feb. and Oct.; 2 Mon. May                                                    | See County Court.                                                                  | See County Court.                                     |
| San Joaquin,   | 12 1st Monday in Jan., Mar., May, July, Sept. and Nov. | 1st Mon. Feb., June, Sept. and Dec.                                                   | See County Court.                                                                  | See County Court.                                     |
| S. L. Obispo,  | 12 2d Monday in Jan., April, August and Dec.           | 1st Mon. Feb., June and Oct.                                                          | See County Court.                                                                  | See County Court.                                     |
| San Mateo,     | 12 3d Monday in Jan., April, July and Oct.             | 1st Mon. Feb., May, Aug. & Nov.                                                       | See County Court.                                                                  | See County Court.                                     |
| Santa Barbara, | 2 1st Monday in Feb., June and October.                | 1st Mon. Feb., June and Oct.                                                          | See County Court.                                                                  | See County Court.                                     |
| Santa Clara,   | 2 1st Monday in March, June, Sept. and Dec.            | 1st Mon. March, July and Nov.                                                         | See County Court.                                                                  | See County Court.                                     |
| Santa Cruz,    | 8 3d Monday in May, Sept. and Jan.                     | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Shasta,        | 7 2d Monday in April, August and Dec.                  | 1st Mon. March, July and Nov.                                                         | See County Court.                                                                  | See County Court.                                     |
| Sierra,        | 7 2d Monday in March, June and Nov.                    | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Slackyou,      | 6 3d Monday in Jan., 1st Mon. May and 8d Mon. Sept.    | 1st Mon. April, Aug., Oct. and Dec.                                                   | See County Court.                                                                  | See County Court.                                     |
| Solano,        | 7 3d Monday in Jan., August and Sept.                  | 1st Mon. Jan., Apr., Oct. 3 Mon. July                                                 | See County Court.                                                                  | See County Court.                                     |
| Sonoma,        | 7 3d Monday in Feb., June and Oct.                     | 1st Mon. April, Aug. and Dec.                                                         | See County Court.                                                                  | See County Court.                                     |
| Stanislaus,    | 12 1st Monday in Feb., June and Oct.                   | 1st Mon. Feb., May, Aug. & Nov.                                                       | See County Court.                                                                  | See County Court.                                     |
| Sutter,        | 12 2d Monday in Feb., June and Oct.                    | 3 Mon. Jan. Mar., May, July, Sept. Nov.                                               | See County Court.                                                                  | See County Court.                                     |
| Tehama,        | 12 1st Monday in March, June, Sept. and Dec.           | 1st Mon. Mar., June, Sept. and Dec.                                                   | See County Court.                                                                  | See County Court.                                     |
| Trinity,       | 12 2d Monday in April, August and Dec.                 | 1st Mon. April, Aug. and Dec.                                                         | See County Court.                                                                  | See County Court.                                     |
| Tulare,        | 12 1st Monday in March, July and Nov.                  | 1st Mon. Jan., May and Sept.                                                          | See County Court.                                                                  | See County Court.                                     |
| Tuolumne,      | 6 1st Monday in March, July and Nov.                   | 1st Mon. Jan.; 3 Mon. May & 1 Mon.                                                    | See County Court.                                                                  | See County Court.                                     |
| Yolo,          | 6 3d Monday in March; 2d Mon. Aug.; 8d Mond. Dec.      | 1st Mon. Jan., April, July and Oct.                                                   | See County Court.                                                                  | See County Court.                                     |
| Yuba,          | 10 3d Monday in Jan., April, July and Oct.             | 1st Mon. Jan., April, July and Oct.                                                   | See County Court.                                                                  | See County Court.                                     |

# CONTENTS.

---

|                         |   |
|-------------------------|---|
| Code of Procedure ..... | 1 |
|-------------------------|---|

## AN ACT

### TO REGULATE PROCEEDINGS IN THE COURTS OF JUSTICE OF THIS STATE, AND OTHER STATUTES.

#### TITLE I.

|                                                           |   |
|-----------------------------------------------------------|---|
| Of the form of civil actions and the parties thereto..... | 2 |
|-----------------------------------------------------------|---|

#### TITLE II.

|                                             |    |
|---------------------------------------------|----|
| Of the place of trial of civil actions..... | 32 |
|---------------------------------------------|----|

#### TITLE III.

|                                                |    |
|------------------------------------------------|----|
| Of the manner of commencing civil actions..... | 38 |
|------------------------------------------------|----|

#### TITLE IV.

|                                        |    |
|----------------------------------------|----|
| Of the pleadings in civil actions..... | 49 |
|----------------------------------------|----|

#### TITLE V.

|                                                   |     |
|---------------------------------------------------|-----|
| Of the provisional remedies in civil actions..... | 128 |
| CHAP. I. Arrest and bail.....                     | 128 |
| II. Claims for delivery of personal property..... | 141 |
| III. Injunction.....                              | 149 |
| IV. Attachment.....                               | 167 |
| V. Deposit in Court.....                          | 184 |



## TITLE VI.

|                                                         |     |
|---------------------------------------------------------|-----|
| <i>Of the trial and judgment in civil actions</i> ..... | 188 |
| CHAP. I. Judgment in general.....                       | 188 |
| II. Judgment upon failure to answer.....                | 197 |
| III. Of issues and the manner of their disposition..... | 201 |
| IV. Trial by jury.....                                  | 206 |
| ART. I. Formation of the jury.....                      | 206 |
| II. Conduct of the trial.....                           | 210 |
| III. The verdict.....                                   | 220 |
| V. Trial by the Court.....                              | 224 |
| VI. Of references and trial by referees.....            | 228 |
| VII. General provisions relating to trial.....          | 234 |
| ART. I. Exceptions.....                                 | 234 |
| II. New trials.....                                     | 238 |
| VIII. The manner of giving and entering judgment.....   | 253 |

## TITLE VII.

|                                                                |     |
|----------------------------------------------------------------|-----|
| <i>Of the execution of the judgment in civil actions</i> ..... | 259 |
| CHAP. I. The execution.....                                    | 259 |
| II. Proceedings supplementary to the execution.....            | 291 |

## TITLE VIII.

|                                                                                                                                    |     |
|------------------------------------------------------------------------------------------------------------------------------------|-----|
| <i>Actions in particular cases</i> .....                                                                                           | 297 |
| CHAP. I. Actions for the foreclosure of mortgages.....                                                                             | 297 |
| II. Actions for nuisance, waste and willful trespasses, in certain cases, on real property.....                                    | 316 |
| III. Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.... | 320 |
| IV. Actions for the partition of real property.....                                                                                | 333 |
| V. Actions for the usurpation of an office or franchise.....                                                                       | 347 |
| VI. Actions against steamers, vessels and boats.....                                                                               | 354 |

## TITLE IX.

|                                                                           |     |
|---------------------------------------------------------------------------|-----|
| <i>Of Appeals in civil actions</i> .....                                  | 362 |
| CHAP. I. Appeals in general.....                                          | 362 |
| II. Appeals to the Supreme Court from the District Courts.....            | 379 |
| III. Appeals to the Supreme Court from the County Courts.....             | 389 |
| IV. Appeals to the District Courts from the Probate Courts.....           | 390 |
| V. Appeals to the County Courts from Justices' and Recorders' Courts..... | 392 |

## TITLE X.

|                                                                                |     |
|--------------------------------------------------------------------------------|-----|
| <i>Miscellaneous proceedings</i> .....                                         | 394 |
| CHAP. I. Proceedings against joint debtors.....                                | 394 |
| II. Confession of judgment without action.....                                 | 395 |
| III. Submitting a controversy without action.....                              | 400 |
| IV. Of arbitrations.....                                                       | 401 |
| V. Offer of the defendants to compromise the whole or a part of an action..... | 405 |

# CONTENTS.

vii

## TITLE XI.

|                                                                                                                                                                   |     |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Of witnesses, and of the manner of obtaining evidence.....                                                                                                        | 407 |
| CHAP. I. Of witnesses.....                                                                                                                                        | 407 |
| II. Manner of compelling the attendance of witnesses, and their rights and duties.....                                                                            | 415 |
| III. Of the examination of parties to an action or proceeding and of persons for whose immediate benefit such action or proceeding is prosecuted or defended..... | 420 |
| IV. Of affidavits.....                                                                                                                                            | 425 |
| V. Of depositions taken in this State.....                                                                                                                        | 427 |
| VI. Of depositions taken out of this State.....                                                                                                                   | 430 |
| VII. Of proceedings to perpetuate testimony.....                                                                                                                  | 433 |
| VIII. Administration of oaths and affirmations.....                                                                                                               | 435 |
| IX. Inspection of documents and miscellaneous provisions as to records and writings.....                                                                          | 436 |

## TITLE XII.

|                                                            |     |
|------------------------------------------------------------|-----|
| Of the writ of <i>certiorari</i> and <i>mandamus</i> ..... | 444 |
| CHAP. I. The writ of <i>certiorari</i> or review.....      | 444 |
| II. The writ of mandate or <i>mandamus</i> .....           | 448 |

## TITLE XIII.

|                                         |     |
|-----------------------------------------|-----|
| Of contempts and their punishments..... | 457 |
|-----------------------------------------|-----|

## TITLE XIV.

|               |     |
|---------------|-----|
| Of costs..... | 463 |
|---------------|-----|

## TITLE XV.

|                                                                                |     |
|--------------------------------------------------------------------------------|-----|
| Of motions, orders, notices, service of papers, and miscellaneous provisions.. | 473 |
|--------------------------------------------------------------------------------|-----|

## TITLE XVI.

|                                                                                                |     |
|------------------------------------------------------------------------------------------------|-----|
| Of proceedings in civil cases in Justices' Courts.....                                         | 479 |
| CHAP. I. Of the parties, and the time and place of commencing actions in Justices' Courts..... | 479 |
| II. Summons, arrest, attachment and claim of personal property..                               | 481 |
| III. Pleadings and trial.....                                                                  | 492 |
| IV. Judgment and execution.....                                                                | 500 |
| V. General provisions.....                                                                     | 506 |

## TITLE XVII.

|                                                                  |     |
|------------------------------------------------------------------|-----|
| Proceedings in civil cases in Recorders' and Mayors' Courts..... | 529 |
|------------------------------------------------------------------|-----|

## TITLE XVIII.

|                               |     |
|-------------------------------|-----|
| Miscellaneous provisions..... | 531 |
|-------------------------------|-----|

## APPENDIX.

|                                                                                                       |     |
|-------------------------------------------------------------------------------------------------------|-----|
| An Act concerning the Courts of Justice of this State and judicial officers...                        | 541 |
| CHAP. I. Courts of Justice in general.....                                                            | 541 |
| II. The Supreme Court.....                                                                            | 541 |
| III. The District Courts.....                                                                         | 546 |
| IV. The Superior Court.....                                                                           | 552 |
| V. The County Courts.....                                                                             | 553 |
| VI. The Courts of Sessions.....                                                                       | 555 |
| VII. The Probate Court.....                                                                           | 561 |
| VIII. Justices' Courts.....                                                                           | 562 |
| IX. Recorders' Courts.....                                                                            | 565 |
| X. Mayors' Courts.....                                                                                | 567 |
| XI. General provisions respecting the Courts of Justice and judicial officers.....                    | 568 |
| ART. I. Courts of Record; publicity of the proceedings of the Courts and their incidental powers..... | 568 |
| II. Particular disqualification of Judges.....                                                        | 569 |
| III. Judicial days, and places of holding Courts.....                                                 | 570 |
| IV. Seals of the Courts of Justice.....                                                               | 572 |
| V. Miscellaneous provisions respecting Courts and judicial officers.....                              | 574 |
| An Act concerning Forcible Entries and Unlawful Detainers.....                                        | 577 |
| An Act concerning Insolvency.....                                                                     | 591 |
| Rules of the Supreme Court.....                                                                       | 611 |
| Index.....                                                                                            | 617 |

☞ For ERRATA, see p. 668.

THE

# CALIFORNIA PRACTICE ACT.

AN ACT TO REGULATE PROCEEDINGS IN CIVIL  
CASES IN THE COURTS OF JUSTICE OF THIS  
STATE.

AS PASSED APRIL 29TH, 1851, AND AS SUBSEQUENTLY AMENDED BY VA-  
RIOUS ACTS OF THE LEGISLATURE UP TO AND  
INCLUDING THE YEAR 1882.

1. **The common law.**—The common law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute. *Van Maren v. Johnson*, 15 Cal. 308. The common law having been adopted as a rule of decision in this State, it is the duty of the Court to enforce it. *Johnson v. Fall*, 6 Cal. 361.

2. **Construction of the act.**—In constructing this act, it is proper to remember that the two leading ends contemplated by the system are simplicity and economy; and it would seem, therefore, to be a just conclusion, that the Court should exercise a liberal construction, and that the main intent and spirit of the act should be fairly carried out. *Adams v. Hackett*, 7 Cal. 201. We adopt the New York construction of the Code where the sections are alike. *Id.* 203. Our system of pleading is formed upon the model of the civil law, and one of its principal objects is to discourage protracted and vexatious litigation. It is the duty of the Courts to assist, as far as possible, in the accomplishment of this object, and it should not be frittered away by the application of rules which have no legitimate connection with the system. *Jones v. Steamship Cortes*, 17 Cal. 497.

3. **It is prospective.**—The Practice Act of April 29th, 1851, is prospective in its operation, and to give it a retrospect beyond the time of its passage, would be in violation of all settled rules of construction. *Thorne v. San Francisco*, 4 Cal. 153, 154.

4. **It applies alike to legal and equitable actions.**—The Practice Act applies to equitable as well as to legal actions, so far as its provisions are consistent with the rights and remedies administered in Courts of Equity. *Duff v. Fisher*, 15 Cal. 375; *Goodwin v. Hammond*, 13 Cal. 168; *Riddle v. Baker*, 13 Cal. 302.

5. **Its effect as to evidence.**—The Practice Act, as to evidence at least, governs all cases, legal or equitable, by the same rules. *Goodwin v. Hammond*, 13 Cal. 168.

6. *Stare decisis*.—Though, on questions of practice, previous decisions are entitled to very great weight, still a single decision made without notice of a statute, cannot be invoked as authority on the principle of *stare decisis*. *Duff v. Fisher*, 15 Cal. 375.

*The People of the State of California, represented in Senate and Assembly, do enact as follows :*

## TITLE I.

### OF CIVIL ACTIONS AND THE PARTIES THERETO.

- SEC. 1. *One form of civil actions, only.*  
 2. *Parties to an action, how designated.*  
 3. *Special issues not made by the pleadings, how tried.*  
 4. *Action to be in the name of the real party in interest.*  
 5. *Assignment of a thing in action not to prejudice.*  
 6. *Executor or trustee may sue without the persons beneficially interested.*  
 7. *When married woman is a party, actions by and against.*  
 8. *If husband and wife sued together, wife may defend.*  
 9. *Infant to appear by guardian.*  
 10. *Guardian, how appointed.*  
 11. *Father or mother may maintain action for injury to child.*  
 12. *Who may be joined as plaintiffs.*  
 13. *Who may be joined as defendants.*  
 14. *Parties in interest, when to be joined. When one or more may sue or defend for the whole.*  
 15. *One action may include different parties to commercial paper.*  
 16. *Action, when not to abate by death, marriage or other disability.*  
 17. *Court, when to decide controversy, or to order other parties to be brought in.*

§ 1. *One form of civil actions, only.*

There shall be in this State but one form of civil actions, for the enforcement or protection of private rights, and the redress or prevention of private wrongs.

N. Y. Code, § 69. Applicable to Justices' Courts.

1. **But one form of civil actions.**—The act that declares "there shall be but one form of civil actions," extends only to the form and to the pleadings, dispensing with technicalities in the statement of the cause of action and defense, without regard to ancient forms, whether of assumpsit, trespass or ejectment, etc. But the distinction between these actions has not been abolished. So the distinction between law and equity continues as marked as ever, though there is no difference in the form of a bill in chancery and a common law declaration under our system. *De Witt v. Hays*, 2 Cal. 463.

2. Under our system there is but one form of actions; the statute makes no distinction in matters of form between actions of contract and those of tort, and relief is administered without reference to the technical and artificial rules of the common law. *Jones v. Steamship Cortes*, 17 Cal. 487.

3. All matters arising and constituting part of the same transaction may be litigated in the same action. Every action under our system may be termed an action on the case, and any ground of relief which can be regarded as part of the case may be included in the action. *Id.* But the general principles which govern such actions are retained. *Lubert v. Chauviteau*, 3 Cal. 463.

4. There is but one form of civil actions in this State, and all the forms of pleading, and the rules by which their sufficiency is to be determined, are prescribed by the Practice Act. Our system requires the facts to be alleged as they exist, and repudiates all fictions. *Payne & Dewey v. Treadwell*, 16 Cal. 220. And the old rules of chancery pleadings are superseded by the Practice Act. *Cordier v. Schloss & Heilbronner*, 12 Cal. 143.

5. Under the Practice Act, while the mere forms of proceedings are simplified, all that is substantial in the body of the law is preserved to give certainty and logical conclusiveness as a science. *Sampson v. Shaeffer*, 3 Cal. 196.

6. Under the Practice of 1850, the rules of the old system of pleading and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to all actions under the new system, where they may be properly applied, and are not inconsistent with statutory provisions. *Rowe v. Chandler & Dennison*, 1 Cal. 167.

7. Probate proceedings are not "civil actions" within the meaning of the Practice Act. *Estate of C. G. Scott*, 15 Cal. 220.

§ 2. *Parties to an action, how designated.*

In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

N. Y. Code, § 70. J. P.

§ 3. *Special issues not made by the pleadings, how tried.*

When a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

§ 4. *Actions to be in the name of the real party in interest.*

[1854, 1855.] Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act; but in suits brought by the assignee of an account, unliquidated demand, or thing in action not arising out of contract, assigned subsequently to the first day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff.

N. Y. Code, § 111; Van Sant. Eq. Pr. 72; Thing in Action, see Voorh. N. Y. Code, 547. J. P.

1. **Construction of this section.**—The language of section four of the Practice Act, as amended by the Act of 1855, is construed to mean a thing in action not arising out of *express contracts*, and even this construction is derived by implication, for there is no statute which directly gives the right, or directly repeals the former rule. *Oliver v. Walsh*, 6 Cal. 456.

2. This section is made subject to section six, which creates the exceptions to the general rule. *Id.*

**REAL PARTY IN INTEREST.**

3. The possession of a promissory note, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved unless a defense is interposed which would otherwise preclude a recovery. *McCann v. Lewis*, 9 Cal. 246; 7 Cal. 389.

4. His right to maintain the action cannot be questioned on the ground that it belongs to a third party, except the defendant pleads payment to, or offset against that party. *Price v. Dunlap*, 5 Cal. 483; *Gushee v. Leavitt*, 5 Cal. 160.

5. Under our system there is but one form of action to enforce private rights, whether legal or equitable, and the action must be in the name of the real party in interest, with certain statutory exceptions, within which cases of assignment do not come. *Wiggins v. McDonald*, 18 Cal. 126.

6. Whatever the rule may be under the old system, under our system the right of action is in the party sustaining the injury; for, on a recovery, the other part, if entitled to receive the money at all, and if judgment were had in the name of both, would hold it by right of, and as trustee for, the other; and our Practice Act, for convenience, has given the right to sue to the party beneficially entitled to the fruits of the action. *Summers v. Farish*, 10 Cal. 347.

7. Formerly, where a bond was given to an officer, state or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the persons interested; but our statute has introduced a new rule, and by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in interest. *Baker v. Bartol*, 7 Cal. 551.

8. On an injunction bond given to plaintiff and others as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

9. Where there are several obligees in such an undertaking, promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery. *Prader v. Parkett*, 13 Cal. 588.

10. A stranger to a transaction has no right to sue. *Cheney v. Palmer*, 5 Cal. 131.

11. B. executed two subscription notes, whereby he promised to pay a certain specified sum to V. C., as executive agent of the company, B. G. G. & Co., "a foreign corporation. In an action brought in the name of V. C. upon the notes: *Held*, 1st, that the contract was between the defendant and the corporation; that V. C. had no beneficial interest in it, was not bound by it and was not the real party in interest; 2d, that he was "a trustee of an express trust," within the meaning of

that term as used in and defined by the Code, and as such, could maintain an action upon the notes in his own name. He was a person "in whose name a contract is made for the benefit of another. *Considerant v. Brisbane*, 22 N. Y. (8 Smith) 389.

12. One who has possession of, and legal title to, anything in action—e. g., a promissory note—is the real party in interest, within section 111 of the Code, though he may have purchased it on agreement to pay for it after its collection. *Cummings v. Morris*, 3 Bosw. 560.

13. In, and previous to, May, 1849, there existed in New York three incorporated associations for similar objects, viz: the American Protestant Society, whose object it was to diffuse through the United States the principles of the Protestant religion; the Foreign Evangelical Society, whose object it was to promote the moral and religious welfare of the inhabitants of foreign Christian countries; and the Christian Alliance, whose object it was to unite the Christians of all denominations in promoting religious freedom and knowledge in Papal countries. These associations were simultaneously dissolved, and the members of them associated themselves as the American and Foreign Christian Union, whose object was declared to be to diffuse religious liberty and pure Christianity both at home and abroad, where a corrupt Christianity exists. The defendant's testator, who died shortly before the union of these societies, bequeathed a legacy, to be paid in six years from his decease, to the person who, at such time, should act as treasurer of American Protestant Society, the first above named. *Held*, 1. That the new Society sufficiently represented the other to be entitled to the legacy. 2. that an action to recover it must be brought in the name of the treasurer of the new Society, he being the real party in interest. *De Witt v. Chandler*, 11 Abbott's R. 459.

14. **Causes of action assignable.**—An order in the following words: Messrs. F. Huth & Co.—Please hold to the order of William Pope & Sons, of Boston, five hundred pounds sterling of insurance effected on cargo of bark *Elvina*, and oblige, etc., is an equitable assignment of the funds in the hands, or to come into the hands of the drawees, to the payees. *Pope v. Huth*, 14 Cal. 407.

15. A contract not to run boats on a certain line of travel, and on failure to comply with such contract, to pay \$15,000, is an instrument in writing, and assignable by our laws. *California Steam Nav. Co. v. Wright*, 6 Cal. 261; 8 Id. 592.

16. An order drawn upon defendant for an amount due from the defendant, is a *prima facie* assignment of the debt due. Even if it was only for part of a debt, no one could make the obligation but the defendants. *McEwen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Id. 97; *Pope v. Huth*, 14 Id. 408. And the drawees having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it. *Id.*

17. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 328.

18. A contract upon which an action would lie by the personal representatives of a party thereto, in case of his death, for the enforcement of his rights and remedies under the same, is legally assignable. *Sears v. Conover*, 34 Barb. 330. A mere personal right to avoid a deed, on the ground that the grantor has been defrauded, cannot be called a chose in action within the most extended definition of that phrase. *Id.*

19. A cause of action to recover money paid under a contract, in excess of the amount due under such contract, on the ground that the over-payment was procured by the defendant by false representations and fraud, is assignable. *Sheldon v. Wood*, 2 Bosw. 267.

20. A cause of action against a common carrier, for negligence in not delivering property sent by him, is assignable. *McKee v. Judd*, 2 Kern. 622; Rev. Stat. 457, § 1; *Smith v. New York & New Haven R. R. Co.*, 16 How. Pr. R. 277.

21. The right of action for money lost at play is assignable. The assignability of things in action is now the rule; nonassignability, the exception. And this exception is confined to wrongs done to the person, the reputation or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage. *People v. Tioga Common Pleas*, 19 Wend. 73; *McKee v. Judd*, 2 Kern. 722. The right to claim and sue for money or property lost in gaming is clearly not within the principles on which the exception rests. To take money



from a person by gaming is, in a just sense, a wrong done in his estate. Such a cause of action, according to all the analogies of the law, is capable of transmission and assignment. *Turner v. Warren*, 2 Strange, 1079; *Bones v. Booth*, 2 Wm. Black. 1226; *Brandon v. Pate*, 2 Hen. Black. 308; *Brandon v. Sands*, 2 Ves. 514; 1859; *Much v. Stoner*, 19 N. Y. (5 Smith) 29.

22. A right of action for the conversion of personal chattels is assignable. (2 Kern. 622.) And whenever a right is vested in one growing out of a contract of any nature, it is assignable; and if the assertion of the original right involves the establishing of fraud or deceit connected with the action, the right to prove this follows the right to the original cause of action, and vests in the assignee with it. *Wescott v. Keeler*, 4 Bosw. 564.

23. Causes of action not assignable.—A cause of action arising out of a tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456.

24. A creditor has not the right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. *Marziou v. Pioche*, 8 Cal. 536.

25. Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. *Bulard v. Kinney*, 10 Cal. 63.

26. The right of action which one has, who has been induced by fraud to execute a conveyance and part with possession, is not assignable. The deed being voidable only, but not void, if it passes all the estate of the grantor, a subsequent grantee cannot maintain an action to set it aside. *McMahon v. Allen*, 34 Barb. 275.

27. Whether a claim for a balance of account, on a settlement of partnership affairs, is assignable. *Spring v. Baker*, 1 Id. 526.

28. What constitutes an assignment.—An assignment of an account by indorsement of the word "assigned," signed by the owner of the account, is sufficient.

29. The words, "assigned to Ryan and Callaghan," and signed "John Nutt," is a good and sufficient assignment. *Ryan v. Maddux*, 6 Cal. 247.

30. Any act, amounting to an appropriation of a debt, will constitute an assignment of it; no particular form of transfer is essential. *Wiggins v. McDonald*, 18 Cal. 126.

31. Defendant being indebted to the E. M. Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the company to plaintiff: *Held*, that this was an equitable assignment of the debt, and that the only mode under our practice in which the assignment can be enforced, is by action in the name of the assignee to recover the debt. *Id.*

32. Under the twelfth section of the act concerning corporations, passed April 22d, 1850, no transfer of stock is good against third parties, unless the transfer be made upon the books of the company. *Weston v. The Bear River Co.*, 5 Cal. 186.

33. The following order: "Mr. Strobe—Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account," if given for a valuable consideration, and for the whole amount of the demand against the drawee, though worthless as a bill, operates as an assignment of the debt or fund against which it is drawn, and after delivery and presentation, the debt due by the drawee could not be reached by attachment. *Wheatley v. Strobe*, 12 Cal. 92.

34. The assignee of a claim resting in account, in suing for it offered as proof of his title to it the following assignment: (Date.) I sell and transfer this account to William Richardson against David Mead. (Signature.) *Held* sufficient. 1. It should not be presumed that the assignment was without consideration. 2. *Cow*. 47.

35. Although there may be an assignment of a chose in action by parol, yet to constitute such an assignment, it must be shown that the owner surrendered all control over it, and had made an absolute appropriation of it. *Rupp v. Blanchard*, 34 Barb. 627.

36. Where a debtor agrees to assign to his creditor a claim which he has against another, in order to make it a valid agreement, the creditor must relinquish his claim against the debtor, otherwise the agreement will be without consideration, and cannot be construed into even an equitable assignment of the claim. *Id.*

37. **What does not constitute an assignment.**—Defendant purchased land of B., and, as part of the consideration, agreed to pay certain debts of B. Neither plaintiff, nor the person to whom the debts were owing, were parties to this agreement, nor did they assent to it or attempt to connect themselves with the transaction prior to this suit. Plaintiff is holder of these debts, and seeks to recover them of defendant: *Held*, that plaintiff cannot maintain the action—there being no privity between the parties, no novation of the indebtedness, and no assent to the transaction, which might make the agreement an equitable assignment. *McLaren v. Hutchinson*, 16 Cal. 80.

38. A written assignment is not valid where it was never delivered to the plaintiff; the mere act of signing the assignment, without a delivery, is insufficient. *Ritter v. Stevenson*, 7 Cal. 389.

39. Where an account is verbally assigned to a creditor, with the understanding that in case he collects it he will credit his claim with a portion thereof, and return the balance to the assignor, but if nothing is received, no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. *Id.*

40. **When the principal may sue on contracts made with agents.**—A principal may sue in his own name on a contract in writing made and signed by his agent without disclosing his principal; but in order to maintain the action, the principal must show the agency, and the power of the agent to bind him at the time. But in such a case, the defendant may make the same defenses against the newly discovered principal as he could against the agent with whom he dealt as principal. *Keniz v. Norton*, 4 Cal. 358.

41. Under the one hundred and fifty-fourth section of the Act of 1856, (370) the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant. But when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown. *Thurn v. Alta Telegraph Co.*, 15 Cal. 472.

42. A principal has a right to waive a tort against his factor and bring an action to compel him to account, and for the net proceeds arising from the sales, when the plaintiff can only recover the net proceeds of sales effected by him, after deducting necessary charges and commissions. *Lubert v. Chauviteau*, 3 Cal. 462.

43. The owner of a ship chartered by and in the name of his agent may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Brooks v. Minturn*, 1 Cal. 482.

44. An action can be maintained by the owner of goods against a carrier in whose custody they are injured, although there is no privity of contract between the owner and the carrier, and notwithstanding the contract was, in fact, made between the carrier and another carrier who undertook the carriage of the goods for the whole distance, and received freight therefor. *Wing v. New York and Erie R. R. Co.*, 1 Hill. 235.

45. **When assignor may sue.**—By agreement between F., the assignor, and D., the assignee, of leases and other personal property, the latter held it subject to a certain debt to the former. The latter afterwards conveyed it to F., subject to the conditions of the agreement, and as a part of the consideration covenanted to pay the debt; F. transferred it to W., and W. to T. and J., with notice respectively: *Held*, that the assignor might maintain an action against all the other parties, to have the debt declared a lien on the property and satisfied by a sale of it, and for personal judgment for deficiency against D. and T. *Halsey v. Reed*, 9 Paige, 446; *King v. Whitely*, 10 Id. 465; *Trotter v. Hughes*, 2 Kern. 74.

46. **When assignee may sue.**—An assignment of a contract as a security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner v. Warner*, 4 Cal. 310.

47. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable; and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 325.

48. Under our statute of April, 1850, the holder of a nonnegotiable note has a right of action, not only against his immediate assignor, but also against previous

assignors; in short, against every person from whom the note has passed by assignment. *Hamilton v. McDonald*, 18 Cal. 128.

49. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

50. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor and assignee, both residing and being at the time in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the *lex loci*, and his title will be maintained here against execution creditors of the assignor. *Forbes v. Scannell*, 13 Cal. 242.

51. The holder of negotiable paper, indorsed before security, is supposed to be the *bona fide* owner of the same, and all intendments are in favor of his right. *Palmer v. Goodwin*, 5 Cal. 458.

52. The presumption of the law is in favor of such holder, to rebut which it is necessary to show by competent testimony that he is not the *bona fide* holder, or that the note was not indorsed until after maturity, or some other fact from which the law will imply a fraud. *Id.*

53. Under our system of practice an action may be brought in the name of the assignee as the party beneficially interested. *Wheatley v. Strobe*, 12 Cal. 98.

54. The owner of personal property, not in his possession, may transfer his right thereto to another, who may, on demanding possession of it, recover its value in an action, if the demand is not complied with, but such a demand is essential to give a right of action. *Hall v. Robinson*, 2 Comst. 293; *Cap v. New Haven R. R. Co.*, 1 E. D. Smith's C. P. R. 522; *Van Hassell v. Borden*, 1 Hill. 128.

55. It is not necessary for the assignee of a thing in action to prove that he paid a consideration, if he shows that he is the real party in interest. Code, § 111; *Arthur v. Brooks*, 14 Barb. 533; *Barnes v. Perine*, 15 Id. 249; *Robertson v. Gardner*, 11 Pick. 146; *Richardson v. Mead*, 27 Barb. 178. See to similar effect, *Nichols v. Atwood*, 10 How. 475.

56. An assignment of "judgment, and of all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon," transfers to the assignee a cause of action against the Sheriff on his liability as bail for a defendant arrested by him in the action. 6 Duer, 182, 1859; *Gallarati v. Orser*, 4 Bosw. 94.

57. A receiver of the property of a judgment debtor may maintain an action against the debtor himself, for a conversion of property the title to which had vested in the receiver. 5 Seld. 142, 1858; *Gardner v. Smith*, 29 Barb. 68.

58. After a receiver of an insolvent railroad corporation has been appointed, and an order made restraining proceedings against the company by any creditor, a creditor cannot bring an action under section ten of the General Railroad Act against a stockholder whose subscription is unpaid, to enforce his personal liability. The right of action for unpaid subscriptions is transferred to the receiver by his appointment, and an action thereon by a creditor is in effect an action against the company. *Rankin v. Elliott*, 16 N. Y. (2 Smith) 577.

59. **When assignee cannot sue.**—Where goods have been wrongfully taken from the possession of one who held a part of them as consignee and a part as owner, and he assigns them and the right to take possession to the consignor and former owner, the assignee cannot maintain an action to recover possession from the wrong-doer, he not having the possession of the property. *Nash v. Fredericks*, 12 Abbott, 147.

60. One who has conveyed real estate to another by deed, and who has a right of action against the grantee to have the conveyance declared void, and set aside on the ground of fraud, undue influence, inadequacy of price, etc., cannot without possession and without any present estate or interest, assign such right of action to another so as to enable the assignee to bring an action in his own name to set aside the conveyance. *McMahon v. Allen*, 34 Barb. 56.

61. The provision of the Code, that every action must be prosecuted in the name of the real party in interest, was not intended and has not had the effect to make things in action, or rights of action, assignable, which were not before assignable even in equity, but was intended to give to the assignee of a thing in action, which was assignable in equity, a right to sue in his own name. *Id.*

62. Where B. sells and delivers to C. certain personal property, with an agreement then made that C. is to resell and redeliver upon B.'s executing and deliver-

ing to C. certain notes, and B. subsequently tenders these notes and demands the property, and C. refuses to take the notes or surrender the property, and the whole transaction on the part of C. was a fraud, his intention being to get hold of and keep the property: *Held*, that the tender of the notes did not vest the ownership thereof in C., and that he cannot sue on them; that the fraud takes the case out of the rule, that a tender of specific personal property vests the title thereto in the tenderer. *Lamott v. Butler*, 18 Cal. 32.

63. A party who sues as assignee cannot maintain his title by proof of an assignment made after suit brought. *Garrigue v. Loescher*, 3 Bosw. 578.

64. An assignment by one of two partners, of all his right and interest in a partnership demand, will not enable the assignee alone to maintain an action on the demand. *Mills v. Pearson*, 2 Hill. 16.

65. A mere assignment of the chattel, after conversion by the defendant, does not pass the cause of action for the conversion so as to enable the assignee to sue thereon. *Hill v. Covell*, 1 Comst. 522. The assignee in such case can maintain no action for conversion, except for a conversion subsequent to the assignment. *Duell v. Cudlipp*, 1 Hill. 166. To the same effect is *Sherman v. Elder*, 1 Id. 178.

66. **Agent, when he may sue.**—The note sued on payable to the plaintiff, although it describes him as agent for another, does not take away the right of the agent to sue in his own name at law. *Ord v. McKee*, 5 Cal. 515.

67. Where two persons were employed by the claimants of a tract of land under a Mexican grant, as agents to procure a confirmation of the grant in the United States, and services are thus rendered, it is individual in its character, and separate actions may be maintained by such agent for his expenses thus incurred. *Connor v. Hutchinson*, 12 Cal. 127.

68. An agent to whom a check is made payable in his own name may maintain an action thereon, though the debt be due to his principal. 2 Bosw. 471; *Fish v. Jacobson*, 5 Bosw. 514.

69. A Sheriff who has attached property belonging to the defendant in the hands of a third person, may bring any action necessary to obtain possession of such property. *Kelly v. Brensing*, 32 Barb. 601.

70. Where the principals are minors, it was held that the agent might sue upon a contract made with him as such, and by which he was personally bound, without any assignment from the principals. *Nelson v. Nixon*, 13 Abbott, 104.

71. The uncontroverted allegations in a complaint of a sale of goods by the plaintiff as the factor or agent of his principal, and the promise of the defendant to pay the plaintiff for them, are sufficient to vest the plaintiff with a right to collect and sue for the price in his own name. *Reilly v. Cook*, 22 How. 93.

72. The agent of a foreign corporation may maintain an action in his own name upon a subscription note payable to the plaintiff, as "executive agent of the company for stock of the corporation to be issued to the signer." *Considerant v. Brisbane*, 22 N. Y. 389.

73. **Agent, when he cannot sue.**—An agent, ordinarily, cannot sue in his own name in respect to the subject matter of his agency, and this rule applies to consignees and indorsees of bills of lading, when they are in truth but the agents of the shippers. *Lineker v. Ayeshford*, 1 Cal. 75. H. purchased goods of P. and M., which were consigned to P., an agent; H. failing to pay for the goods upon delivery, P. brought an action to recover the purchase money; *Held*, that P. had no right of action in his own name. *Semble*, if the purchase had been made directly from P. although the goods belonged to another, the rule would be different. *Phillips v. Henshaw*, 5 Cal. 502.

74. A., of Liverpool, shipped certain goods to San Francisco, and indorsed the bills of lading to the plaintiff, his agent, and became a bankrupt before the arrival of the goods: *Held*, it appearing on the face of the complaint that the plaintiff was a mere naked agent of the shippers, that he could not recover the goods in his own name of the master of the ship, who claimed to hold the goods for the assignment in bankruptcy of A. *Lineker v. Ayeshford*, 1 Cal. 78.

75. The indorsement of a bill of lading *prima facie* vests the property in the goods mentioned therein in the indorsee, but a bill of lading is not a negotiable instrument, so far as to enable an indorsee who has no property, either general or special, in the goods, and no lien therein for advance or otherwise, to sue the mas-

ter of the ship in his own name for nondelivery of the goods, when it appears on the face of the complaint that the plaintiff, the indorsee, is a mere naked agent of the shippers. *Id.*

**76. Agent, when he shall not be sued.**—A public officer who stands in the relation of agent of the government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties; but this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Dwinelle v. Henriquez*, 1 Cal. 392.

**77.** Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: *Held*, that no legal right of complaint will lie against the agent. *Engels v. Healty*, 5 Cal. 136.

**78.** If on the face of an instrument not under seal, executed by an agent, with competent authority, by signing his own name simply, it appears that the agent executed it in behalf of the principal, the principal and not the agent is bound. *Haskell v. Cornish*, 13 Cal. 45.

**79. Unliquidated demand or account, what is.**—Where a reward is offered in the usual way in the public newspapers, or by handbills, for the arrest and delivery to the proper authorities of persons suspected of crime, and a party accordingly arrests and delivers the persons suspected, who are tried and convicted: *Held*, that the demand for the amount of the reward is neither an "unliquidated demand," nor an "account," within the fourth section of the Practice Act, and hence that the assignor of such demand is a competent witness for the assignee in suit against the persons offering the reward. *Rochester v. See Yup Company*, 18 Cal. 413.

**80.** If in any case one partner can assign to another partner his interest in a firm claim and then become a witness for him, he cannot, when the claim is for goods sold and delivered, because this is an unliquidated demand within the Practice Act. *Cravens v. Devoey*, 13 Cal. 40.

**81.** An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted. *Branger v. Chevalier*, 9 Cal. 360.

**82.** Where accounts bear upon their face the words "audited and approved" and "certified to be correct:" *Held*, that this is sufficient language to create them instruments in writing within the meaning of the statute, and not accounts. *Sanickson v. Brown*, 5 Cal. 57.

**83. When assignor may and may not be a witness.**—The assignor of an agreement to pay money for the withdrawal by him of a suit, is a competent witness for the assignee in a suit brought by the latter on the agreement. *Gray v. Garrison*, 9 Cal. 325.

**84.** Assignors of unliquidated demands are competent witnesses to prove to the Court the loss of books of original entries and incidental matters auxiliary to the trial of a cause. *Caulfield v. Sanders*, 17 Cal. 569.

**85.** Where goods are seized by the Sheriff on an execution against G., and the owners of the goods, so in the Sheriff's hands, assign them to plaintiff who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a *chose in action*, but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 213; see 13 *Id.* 40.

**86.** A guarantor is a competent witness for defendant, as the effect of his testimony is to make plaintiff liable on his guaranty, thus rendering his interest adverse to defendant. *Mayo & Brown v. Avery*, 18 Cal. 309.

**87.** The assignor of a demand for money loaned or advanced at various times on an open account, the return of which depends on future conditions, is not a competent witness for the plaintiff in an action by the assignee to recover the amount. *Allen v. Citizens' Nav. Co.*, 5 Cal. 400.

**88.** Where a reward is offered in the usual way in the public newspapers, or by handbills, for the arrest and delivery to the proper authorities of persons suspected of crime, and a party accordingly arrests and delivers the persons suspected, who are tried and convicted: *Held*, that the demand for the amount of the reward is neither an "unliquidated demand," nor an "account," within the fourth section of

the Practice Act, and hence that the assignor of such demand is a competent witness for the assignee in suit against the persons offering the reward. *Rochester v. See Yup Company*, 18 Cal. 413.

89. The assignor of an account assigned to some creditors for the benefit of all, though absolute upon its face, yet made with the purpose that some creditors might be preferred in the order of payment, may be a witness to show the consideration upon which the assignment was made in a suit brought by some of the creditors against the assignees. *Lockwood v. Canfield*, April T. 1862.

90. The objection to a witness need not be only in a suit brought by the assignee. A substantial and a formal assignee stand alike on the same ground. *Adams v. Haskell*, 8 Cal. 306. The assignor of a claim is incompetent as a witness in favor of the claim when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party. *Id.*

91. Where the plaintiff was the assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor before the assignment, it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith v. Truebody*, 2 Cal. 347.

92. An assignment of a cause of action, to be sufficient to enable the assignee to bring action and call the assignor as a witness, must be a fair and *bona fide* transaction, in which the interest in the claim passes to the assignee for his benefit and not for the use of the assignor. And where it appears that the assignment was merely colorable—made only for the purpose of enabling the assignor to be a witness to make out the case against the defendants—and with the clear intent that the money, if recovered, should be paid to the witness, the witness comes fully within the description of a person for whose immediate benefit the action is prosecuted. *Bell v. Drew*, 4 E. D. Smith, 59.

93. The master of a vessel having an unsettled account with her owner for his wages—a part of which had been paid by his receipts from the earnings of the vessel—and disbursements on her account, assigned his claim to a third person; the assignee brought an action, and it appeared on the trial that there was a balance due from the defendant: *Held*, that under the Code the defendant could not require the master to be made party to the action for the purpose of enforcing an accounting. He was a competent witness for either party, and upon his examination the codefendant could have every benefit from his testimony and from the production of books and papers which he could obtain from his accounting as a party. *Allen v. Smith*, 16 N. Y. (2 Smith) 415.

94. In an action to set aside an assignment for the benefit of creditors on the ground of fraud, the assignor may be permitted to testify as to his actual intent in executing it. *Matthews v. Poultney*, 33 Barb. 127.

### § 5. Assignment of thing in action not to prejudice.

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration before due.

N. Y. Code, § 112. J. P.

1. **Negotiable promissory notes transferred as collateral security.**—Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne v. Bensley*, 8 Cal. 260.

2. **Commercial paper, transferred before maturity as collateral security for a preëxisting debt,** is not subject to the defenses of payer against payee. *Robinson v. Smith*, 14 Cal. 94.

3. If, when a creditor takes a bill before maturity as collateral security for an antecedent debt, there be any change in the legal rights of the parties in relation to such debt, the creditor becomes a holder for value, and the bill is not subject to the equities between the original parties. *Naglee v. Lyman*, 14 Cal. 450.

4. Where defendant made and delivered to K. & Co. her note, to be used by them only as collateral security to raise money or get credit, and they so used it, and afterwards took it up from the pledgees: *Held*, that K. & Co. could not then sue on the note, as it had answered its purpose; and that plaintiff, having taken the note after maturity and upon no new consideration, took it subject to the same defense. *Coghlin v. May*, 17 Cal. 515.

5. One who purchases a note or bill, drawn, indorsed or accepted by a manufacturing corporation, cannot, without inquiry into their authority to make, or the authority of their officer or agent to bind them by such a contract, rely on the mere fact of the drawing, indorsing or accepting, and claim to be regarded as a *bona fide* holder for value, without any reference to the question of actual consideration, or to that of the authority of the officer or agent. *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 10 Abb. 47. Discounting a bill in expectation that it will be accepted as previous similar bills had been, is not discounting it on the faith of an acceptance. *Id.*

6. One who discounts a bill for value and without notice, before acceptance, though he becomes thereby a *bona fide* holder as against the drawer, does not thereby become a *bona fide* holder for value as against the subsequent acceptor. *Id.*

7. A due bill is a promissory note, within the statute. 10 Wend. 675; 2 Cow. 536; *Sackett v. Spencer*, 29 Barb. 180.

8. Assignee and indorsee after maturity, right of.—An indorsee, after maturity, takes the same interest that the indorsee had, and his claim is subject to the same legal and equitable defense. *Folsom v. Bartlett*, 2 Cal. 164.

9. A negotiable note, taken by the holder after its maturity, is taken subject to all subsisting equities between the maker and the payee, but not such as subsisted between the maker and any intermediate holder. *Warner v. Wilson*, 4 Cal. 309.

10. The maker of a promissory note, held by a corporation, and on the insolvency of the corporation, passing to a receiver thereof, (appointed to wind up its affairs for the benefit of creditors and stockholders) has the same right to set off against such note in the hands of the receiver which he would have in the hands of the corporation itself. *Berry v. Brett*, 6 Bosw. 627. The fact that the note has not become payable at the time of the appointment of a receiver, does not affect the rule. *Id.*

11. In action brought by the assignee of a merchant to recover possession of moneys, etc., from an agent of the assignor, who had notice of the assignment and continued to act for the assignees, said agent cannot set off against the plaintiff's claim debts due to him by the assignor arising after such assignment was made. *Crosbie v. Leary*, 6 Bosw. 312.

12. Where the plaintiff purchased of S. a note by the defendant, which was over due, and the defendant at the same time held a note against S., which was over due, and which was prosecuted to judgment by the defendant against S., subsequently, the plaintiff brought his action against the defendant on his note: *Held*, that the defendant could not use the note by S. as a set-off, defense or counter claim, it being merged in the judgment and not a subsisting demand at the time the action was commenced. Nor could he use his judgment, as it was not rendered until after the plaintiff had purchased the note in suit, which was not a demand against S. *Lowell v. Lane*, 33 Barb. 292.

13. Checks, consideration, defenses.—A check given for a gaming debt is void in the hands of all persons, except a *bona fide* holder, without notice. *Fuller v. Hutchings*, 10 Cal. 523.

14. Where the illegal consideration of a check is admitted, it is incumbent on the holder, even if he took it before dishonor, to show that he took it without notice and for value. *Id.*

15. With a check, the presumption is that it is given upon a valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Id.*

16. A party taking a check after its presentation for payment to the bankers upon whom it is drawn and its dishonor, takes its subject to all the defenses to which it was subject in the hands of the original holder. *Id.*

17. **Bond and mortgage.**—The assignee of a bond and mortgage held not to be subject to existing equities in a peculiar case. *Cornell v. Townsend*, 19 How. 184.

18. **Judgments.**—Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment by taking the note of third persons, not negotiable in the mercantile sense, in payment. The makers of the note agreed to this, under the supposition induced by him that he was the owner: *Held*, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

19. An assignee of a judgment and of the Sheriff's certificate of a sale thereunder, stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done to the assignee. *Reynolds v. Harris*, 14 Cal. 681.

20. **Recovery, extent of.**—Where the consideration passing between the indorsee and indorser is not equal to the amount of the paper, the indorsee in an action against the indorser can recover only the consideration he has actually paid. *Coye v. Palmer*, 16 Cal. 158.

21. **Set-off, how defeated.**—Until a payment becomes mature, a set-off may be defeated by the assignment of the claim of the opposite party, though the latter be insolvent, and his demands have not become payable when assigned. *Myers v. Davis*, 22 N. T. R. 489.

22. **Equitable assignments.**—The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and he stands in the shoes of the assignor as to all defenses which existed against the judgment between the parties to it. *Wright & Co. v. Levy*, 12 Cal. 257.

23. A certificate of deposit of \$1,800, payable to the order of V., was indorsed, sold and delivered by V. to L. for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V. Subsequently, L. transferred the certificate to plaintiff: *Held*, that plaintiff can recover of V. only the four hundred dollars received by him, the certificate being subject, in the hands of plaintiff, to all the equities between the indorser and indorsee. *Coye v. Palmer*, 16 Cal. 158.

24. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility—provided they are fairly made and are not against public policy; and a contract for such interest will take effect as an assignment when the subjects to which they refer have ceased to vest in possibility and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123.

25. On suit upon an assigned account, the defendant may plead any defense he may have against the assignor before notice of the assignment, not as a counter claim, as that would be in violation of section forty-seven, but must be set up as an equitable defense, on the ground that the assignee takes the demand subject to an existing equity. *Duff v. Hobbs*, Jan. T. 1862.

26. **Choses in action fraudulent between the parties to it.**—A nonnegotiable chose in action, created by the immediate parties to it for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such chose in action. *Wright & Co. v. Levy*, 12 Cal. 257.

#### NOTICE OF ASSIGNMENT NOT NECESSARY.

27. A sold to B a bill of goods to arrive on a certain vessel; B paid part of the purchase money, and was to pay the balance as soon as the vessel arrived. B



assigned the contract to C, who, within a reasonable time after the arrival of the vessel, tendered the balance of the money to A, and demanded the goods: *Held*, that C was entitled to the goods, and no notice of the assignment was necessary to charge A. *Morgan v. Lowe*, 5 Cal. 325.

28. A complete title to a chose in action, consisting of a debt due from a third person, passes by its assignment without notice to the debtor. 3 Hill, 228; *Richardson v. Ainsworth*, 20 How. 521.

§ 6. *Executor, trustee, etc., may sue without joining the persons beneficially interested.*

[1854.] An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

N. Y. Code, § 113. J. P.

1. **Executor and administrator, plaintiff.**—An administrator, by our statute, being entitled to possession of the real estate of the deceased, may maintain ejectment. *Curtis v. Herrick*, 14 Cal. 117.

2. Where a patent of land was issued by the United States to executors, and an executrix of the last will and testament of one H., in trust for the heirs and devisees of said H., and the executrix subsequently intermarried with one of the executors: *Held*, that under the statute of this State the authority of the executrix ceased by her marriage, and that ejectment based upon the patent was properly brought in the names of the executors. *Teschemacher v. Thompson*, 16 Cal. 11.

3. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the Probate Court is necessary in such cases. *Halleck v. Mixer*, 16 Cal. 579.

4. An executor who, for a consideration proceeding from the estate of the testator, takes a note payable to him as executor, may maintain an action thereon in his representative capacity. *Eagle v. Fox*, 8 Abbott's Pr. R. 40.

5. A suit in the name of an executor or an administrator is properly brought at any time before administration is had, or a decree of distribution is made by the Probate Court. *Curtis v. Sutter*, 15 Cal. 259.

6. A will required the executors to convert the estate of the testator into money, and after the payment of certain debts, etc., to divide the net proceeds among his four grandchildren, provided that if one of them, M., should die without lawful issue, her share should be divided among the other three. B., having been appointed her guardian, executed a bond, conditioned, among other things, to repay the executors, or their survivors, all moneys which he should receive as guardian, if M. should die without lawful issue. She having died: *Held*, that action of B., to recover the moneys paid to him, was properly brought in the name of the executors. No action could be maintained by the executory legatees for want of privity of contract. They could look only to the executors of the will. *Tyson v. Blake*, 22 N. Y. (8 Smith) 558.

7. Where a plaintiff dies after final judgment in his favor, and before execution issued, his executor or administrator may have the same remedy by action to enforce the judgment as was obtainable by *scire facias* prior to the Code. *Ireland v. Litchfield*, 22 Howard's Pr. R. 178.

8. **Executor and administrator, defendant.**—It was necessary to file this bill and make the administrator, the widow and the infant parties, to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of deceased, and the administrator had possession of the personal property. These objects could only be

accomplished by proceedings in the District Court, as the Probate Court did not possess the judicial means of giving relief. *Gray v. Palmer*, 9 Cal. 616.

9. In cases of joint and several contracts, an administrator cannot be joined with the survivor. *Humphreys v. Crane*, 5 Cal. 173.

10. In actions upon joint and several contracts or obligations, an administrator cannot be joined with the survivor, because the one is joined *de bonis testatoris*, and the other *de bonis propriis*. *May v. Hanson*, 6 Cal. 642.

11. In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it. *Harwood v. Marye*, 8 Cal. 580.

12. The general right to sue an administrator was taken away by the statute. The claimant must present his claim, otherwise he can maintain *no action thereon* against an administrator or executor. Wood's Dig. 404, §136. Mortgages and liens of record form no exception to the rule. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, Id. 412; *Hentsch v. Porter*, 10 Id. 559.

13. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued. *Hentsch v. Porter*, 10 Cal. 555.

14. The executor or administrator of a deceased joint debtor, or owner of real or personal property, cannot be joined in an action with the survivor for a debt due the joint debtors, or for an injury to their joint property. *Buckam v. Brett*, 22 Howard's Pr. R. 233.

15. **Trustee of an express trust, who is.**—Bonds taken in the name of the people of the State for the benefit of others should be prosecuted, not in the name of the people, but in that of the party in interest. *Baker v. Bartol*, 7 Cal. 551.

16. An attorney in fact does not hold the character of a trustee, and is not a necessary party to a suit to represent the interest of a principal. *Powell v. Ross*, 4 Cal. 197.

17. Defendants were the holders of a mortgage executed by the Yreka Water Company and B. to them, to secure advances made and to be made by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: *Held*, that the action lies; that defendants are in possession of money which, in equity and conscience, they are bound to pay over. *Held further*, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and retain money which they would not otherwise have received. *Kreutz v. Livingston*, 15 Cal. 344.

18. A Deputy Sheriff, having levied an execution, took a bond of indemnity, whereby the obligors bound themselves to the Sheriff, conditionally, to indemnify the Sheriff, "and all and every person and persons aiding him in the premises." The Deputy, having sold under the execution, was sued by a third party, who recovered judgment against him: *Held*, that the Sheriff was trustee of an express trust. The obligation was executed to him for the benefit of his Deputy; and suit thereon was properly brought in the name of the Sheriff, without any assignment of the cause of action to him. Code, § 113; *Stillwell v. Hurlbert*, 4 Smith's (18 N. Y.) R. 374.

19. Where property is vested in an officer, for the time being, of a foreign government, and he is authorized to maintain an action therefor in his own name by the country he represents, he may maintain such action in this State. *Peel v. Elliott*, 7 Abbott's Pr. R. 433.

20. A person who, as agent, executes a contract which does not disclose the name of his principal—e. g., a lease signed "A, as agent for the owner"—is a trustee of an express trust, within the meaning of section one hundred and thirteen of the Code, and may maintain an action on the contract in his own name. *Morgan v. Reid*, 7 Abbott's Pr. R. 215.

21. It seems, that in case of such a contract, either the principal or the agent may maintain an action. *Id.*

22. The parties for whom the plaintiff assumed to act are not necessary parties to an action in his name on the contract. *Rowland v. Phalen*, 1 Bosw. 43.

23. The agreement on which the action was brought showed that the plaintiff (whether with or without authority) assumed to act on the behalf of I. and others not named, and to bind himself personally to accomplish certain results beneficial to the defendants, in consideration of their agreement to pay him, for the benefit of those for whom he acted, certain moneys and notes: *Held*, that he was a trustee of an express trust, within section one hundred and thirteen of the Code. *Id.*

14 24. A mere naked agent, having no interest and no liability in respect to the contract, is not to be deemed "a person with whom, or in whose name, a contract is made for the benefit of another." Where the agreement is in writing, it must appear that the agent is himself a party to the contract, in order to enable him to maintain the action. *Harp v. Osgood*, 2 Hill, 219; *Taintor v. Prendergast*, 3 Id. 72; *Bagley v. Onondaga County Mut. Ins. Co.*, 6 Id. 476; *Grinnell v. Smith*, 2 Sandf. 706; *Union India R. Co. v. Tomlinson*, 1 E. D. Smith, 364; *Piggott v. Thompson*, 3 Bos. & Pul. 147; *Bowen v. Morris*, 2 Taunt. 374; and see also *Sargent v. Morris*, 3 Barn. & Ald. 277; *Gilmore v. Pope*, 5 Mass. 491, reaffirmed in *Taunton & South Boston Turnpike Co. v. Whiting*, 10 Mass. 336. And where there is any doubt on the face of the contract, as to the relation of the plaintiff to it, if the other allegations of the complaint show that he was the merely naked agent of the real party in interest, he cannot recover. *Considerant v. Brisbane*, 2 Bosw. 471.

25. B. executed two subscription notes, whereby he promised to pay a certain specified sum to "V. C., as executive agent of the company, B. G. & Co.," a foreign corporation. In an action brought in the name of V. C. upon the notes: *Held*, 1st, that the contract was between the defendant and the corporation—that V. C. had no beneficial interest in it, was not bound by it, and was not the real party in interest; 2d, that he was "a trustee of an express trust," within the meaning of that term as used in and defined by the Code, and as such, could maintain an action upon the notes in his own name. He was a person "in whose name a contract is made for the benefit of another." *Considerant v. Brisbane*, 22 N. Y. (8 Smith) 389.

26. **When the cestui que trust may maintain an action.**—Where a trustee refuses to do so, the *cestui que trust* may maintain an action to compel him to. The rule of equity, that where a trustee refuses to commence an action which the interest of the *cestui que trust* requires should be brought, the latter, upon the ground of that refusal, may maintain an action in his own name, making the trustee a party defendant, has not been abolished by the Revised Statutes, (1 Rev. Stat. 729, § 60) but is confirmed. *Miller v. Mainwaring*, Cro. Car. 397; *Crabb's Real Prop.* § 1300; *Griffen v. Ford*, 1 Bosw. 123.

### § 7. *When a married woman is a party—actions by and against.*

When a married woman is a party, her husband shall be joined with her, except that:

1st. When the action concerns her separate property she may sue alone.

2d. When the action is between herself and her husband she may sue or be sued alone.

From § 114, N. Y. Code. J. P.

1. **Wife, when she may sue alone.**—The Practice Act gives to a married woman the right to sue without her husband, where the action concerns her separate estate. *Smider v. Webb*, 3 Cal. 83.

2. The Practice Act permits the wife to sue alone when the action is between herself and her husband. If it is necessary to introduce other parties, their introduction cannot affect her rights. *Kashaw v. Kashaw*, 3 Cal. 312.

3. In the exceptional cases mentioned in section seven of the Practice Act, the

statute is not obligatory on the wife to sue or defend alone; it confers only a privilege which in many cases it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded her. When the action concerns her separate property, and is not between herself and husband, she may sue with or without him. *Van Maren v. Johnson*, 15 Cal. 308.

4. When the action concerns the separate property, she may seek the aid of the Court with or without the aid of her husband. *Id.*

5. Where the wife executed and delivered to defendant a deed of her separate property in consideration of his promise to pay her five hundred dollars, and sues for the money, alleging that it has not been paid, and that she has never consented, orally or in writing, that her husband might receive or use it: *Held*, that although his misjoinder as plaintiff is not ground of demurrer, still, if the money has been paid to him, that fact may constitute a defense to the action. *Kays v. Phelan*, 19 Cal. 128.

6. A husband and wife cannot maintain an action in their joint names to recover for the conversion of the separate property of the wife. The wife must sue alone. (*Van Santv's Pl.* 99-105, reviewing *Van Buren v. Cockburn*, 2 Code, 62; *Ingraham v. Baldwin*, 12 Barb. 10; *Willis v. Underhill*, 6 How. Pr. 396; *Rusher v. Morris*, 9 Id. 266; *Houland v. Fort Edward Paper Mill Co.*, 8 Id. 505, 512; *Brownson v. Gifford*, 8 Id. 389; *Smith v. Kearney*, 9 Id. 466.) *Ackley v. Tarbox*, 29 Barb. 512.

7. An action by a married woman for fraudulent representations, whereby she was induced to sell lands which were her separate property, and with this separate property to purchase certain worthless stock, is properly brought by her alone under section one hundred and fourteenth of the Code. *Newburg v. Garland*, 31 Barb. 121.

8. It seems, that though any covenant on her part would be void, yet if the lease contained such, the defendant, being a wrong-doer, could take no advantage of it. *Darby v. Callaghan*, 16 N. Y. (2 E. D. Smith) 71; 7 Abbott's Prac. 522.

9. A married woman may, under the Acts of 1848 and 1849, (Laws of 1848, 307; Laws of 1849, 528) take a lease of real property; and where she has taken possession under such lease, and has been deprived of it by a third party, she may maintain an action against him to recover possession, without joining her husband. *Id.*

10. **Wife, when she cannot sue or be sued alone.**—The law which deprived a married woman of the right to make contracts, is not altered by the statute, unless in respect to the property specified by it, and she cannot bring suit in her own name upon a contract which she was not authorized by the statute to make. *Snider v. Webb*, 3 Cal. 83.

11. A *femme covert* cannot contract, under the laws of this State, so as to render her liable in a suit at law. *Rowe v. Kohle*, 4 Cal. 285.

12. A wife cannot sue alone to recover the homestead; it is a joint estate, with right of survivorship, and both husband and wife must join in the action. *Poole v. Gerard*, 6 Cal. 71.

13. The wife has no right in the homestead, independent of the husband, which she can enforce against his consent. She cannot maintain a suit for it in her individual name. *Guid v. Guid*, 14 Cal. 506.

14. **Prochein ami discarded.**—The object of the act is to take away the necessity of suing by prochein ami, and being a remedial statute, must be beneficially construed. *Kashaw v. Kashaw*, 3 Cal. 312.

15. A married woman, though doing business on her own account, and though her husband had abandoned her, is not liable in a mere action for damages for breach of contract. *Morgan v. Andrut*, 18 How. Pr. 371.

16. **When husband and wife must join.**—A wife cannot sue alone to recover the homestead; it is a joint estate with right of survivorship, and both husband and wife must join in the action. *Poole v. Gerard*, 6 Cal. 71.

17. When the homestead was claimed by the husband on an action in which he was alone defendant, to foreclose a mortgage made by him alone since his marriage, neither the rights of the husband or wife could be affected by the proceed-

ings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both. *Revalk v. Kraemer*, 8 Cal. 66; *Van Reynegom v. Revalk*, Id. 76; *Cook v. Klink*, Id. 352; *Marks v. Marsh*, 9 Id. 97; *Moss v. Warner*, 10 Id. 297.

18. In an action against the husband alone, the homestead right cannot be determined. Both parties must be before the Court. *Kraemer v. Revalk*, 8 Cal. 74.

19. The homestead right cannot be individually asserted; both parties must join. *Cook v. Klink*, 8 Cal. 347.

20. In an action to foreclose a mortgage against a husband where the defendant sets up the right of homestead, the Court should order the wife of defendant to be brought in as a party, as no decision upon the question of homestead can be conclusive, either upon the husband or the wife, unless both are parties. *Marks and Wife v. Marsh*, 9 Cal. 96.

21. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant executes an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking in the name of the husband and wife: *Held*, that the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking. *Tissot and Wife v. Darling*, 9 Cal. 278.

22. An action brought by the husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness and other injuries, though based on a contract, sounds in tort, and the wife is a proper and necessary plaintiff. *Warner and Wife v. Steamship Uncle Sam*, 9 Cal. 697.

23. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the Court be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner and Wife*, 10 Cal. 296.

24. Where suit is brought against a female who subsequently marries, her husband must be made codefendant. But this should be done, and an averment of the marriage made, by a supplemental complaint, and not by an amendment to the original. *Van Maren v. Johnson*, 15 Cal. 308.

25. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff. *Id.*

26. In a suit to foreclose a mortgage executed by the husband to plaintiff, the wife may be made defendant if she claim the premises as her separate property by virtue of a previous conveyance from the husband to her. *Bohner v. Ashenauer*, 17 Cal. 578.

27. Husband and wife must join in an action for an injury done to the person of the latter, and it is immaterial that the injury is charged to have been committed in violation of a contract. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

28. In an action brought to recover the purchase money of a lot belonging to a married woman as her separate property, the husband may join with her, but his nonjoinder is not a ground for demurrer. *Kays v. Phelan*, Oct. 1861.

29. Both husband and wife are necessary parties to an action for a tort of the wife not committed in the presence of the husband. 2 Kent's Com. 149; *Marsh v. Potter*, 30 Barb. 506.

30. In foreclosing a purchase money mortgage, the wife of the mortgagor is a necessary party. *Mille v. Van Voorhies*, 10 Abbott's Pr. 152.

31. The omission to make such wives parties to the foreclosure constitutes a defect in the title, which discharges a purchaser from specific performance. Such a defect is not a proper subject for compensation. *Id.*

32. **When husband and wife cannot be joined.**—A defendant in a foreclosure suit cannot object that his wife, who joined in the execution of the mortgage, is not made a codefendant. *Powell v. Ross*, 4 Cal. 197.

33. In an action against a married woman, alleged to be a sole trader under the Act of April, 1852, on a contract executed by her as such, it is improper to join

her husband with her as defendant, and a complaint so drawn is demurrable. *McKune v. McGarvey*, 6 Cal. 497.

34. In an action brought by a married woman concerning property belonging to her as sole trader, under the Act of 1852, the husband need not be joined. *Guttman v. Scannell*, 7 Cal. 455.

35. Where the husband and wife are joined as plaintiffs, and the contract sued on and set forth in the complaint was made between the husband only and the defendants, the name of the wife as plaintiff was mere surplusage, and not a defect of parties under the Code, and might have been stricken out on notice, if insisted. *Warner and Wife v. Steamship Uncle Sam*, 9 Cal. 697.

36. Husband and wife cannot recover jointly in an action by them *ex contractu* for the breach of a contract made with defendant for the transportation of the wife from San Francisco to New York. *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526.

37. In a suit for damages to the common property, the wife should not be a party, and if so made the complaint is demurrable. *Id.*

38. But if, in such action, no demurrer be interposed, and if the facts stated and proven show that plaintiffs are entitled to relief for fraud practiced by defendant, or for personal injury to the wife, then the action to that extent is well brought, and relief will not be denied on the ground that the same facts would support an action on the contract in which the husband alone can recover. *Id.*

39. **When husband must sue alone.**—For injury effected by deceit or otherwise, to the common property, or business carried on by means of the common property, the remedy is by the husband alone, without the wife. *Barrett v. Tewksbury*, 18 Cal. 334.

40. Husband and wife cannot recover jointly in an action by them *ex contractu* for the breach of a contract made with defendant for the transportation of the wife from San Francisco to New York. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

41. So, where plaintiffs—husband and wife—bring an action of damages for deceit, the complaint averring in effect that defendant's wife executed a deed of a certain lot to plaintiffs, who paid therefor \$3,000—the purchase being induced by the fraudulent representations of defendant that his wife's title was perfect, etc.—and also that in consequence of this title proving worthless, plaintiffs lost the lot, with valuable improvements by them placed thereon, and that their business of hotel keeping conducted thereon, and of street grading connected therewith, was destroyed, etc.: *Held*, that demurrer for misjoinder of plaintiffs, lies; that the money paid for the lot, the lot itself, and the business, are, on the face of the complaint, common property, there being no averment that the wife had any separate interest in the money or in the business. *Barrett v. Tewksbury*, 18 Cal. 334.

42. If the wife is improperly joined, it must be taken advantage of by demurrer. *Tissot v. Throckmorton*, 6 Cal. 471.

43. Husband and wife, as plaintiffs, brought two actions against the same defendant; one on a contract with the wife to pay for board in a boarding-house kept by her, and claiming that the amount due the wife was her separate property; the other for a tort, alleging that the defendant broke and entered a closet, in the possession of and occupied by the wife, and also broke and entered the dwelling-house occupied by the wife, and forced open the doors, whereby the wife was, etc.: *Held*, 1. That these causes of action were vested in the husband alone. The allegation that the demand on contract was the wife's separate property, was inconsistent with the legal conclusion from the facts stated; and the legal injury, in the second case, was to the husband alone. 2. That the misjoinder of the wife was ground of demurrer. The rule that a misjoinder of plaintiffs is not ground of demurrer is not applicable to the case of an action by husband and wife, which should have been brought by the husband alone. In such a case the defect cannot, as in other cases, be obviated at the trial by rendering a judgment in favor of the proper plaintiff, and against one improperly joined; and if such judgment could be given, it would not indemnify the defendant for costs. *Dunderdale v. Grymes*, 16 How. Fr. R. 195.

### § 8. *If husband and wife be sued together, the wife may defend.*

If a husband and wife be sued together, the wife may defend for her own right.

1. To enable her to defend in her own right, she must possess as defendant the rights of a *femme sole*, and be able to make as binding admissions in writing in the action as other parties. *Aldenon v. Bell*, 9 Cal. 315.

2. Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly as if the trial was separate. *Duprey v. Duprey*, 5 Cal. 387.

3. When the wife is made a party defendant with her husband, it is no objection to the right of the plaintiff to recover, that the wife was denied the benefit of a separate trial. *Duprey v. Duprey*, 5 Cal. 387.

4. **Wife may intervene.**—The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the Court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner and Wife*, 10 Cal. 296.

5. Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to a full adjudgment of the controversy, and should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 504.

6. **Judgment, how entered.**—In a suit against husband and wife for services rendered by plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced only against the separate property of the wife, and the common property of both. *Van Maren v. Johnson*, 15 Cal. 308.

### § 9. *Infant to appear by guardian.*

When an infant is a party, he shall appear by guardian, who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a County Judge.

N. Y. Code, § 115, J. P.

1. Where a will appoints a guardian, there is no necessity for the issuance of any letters of guardianship to authorize the guardian to act. The guardian's authority comes directly from the will. *Norris v. Hains*, 15 Cal. 255.

2. The Court has no right to appoint a guardian *ad litem*, until the infant is properly brought into Court. *Gray v. Palmer*, 9 Cal. 616.

3. Where the interest of the minor requires it, the Court in which an action is pending will appoint a guardian *ad litem*, even though the minor may have a general guardian. *Gronfier v. Puymisol*, 19 Cal. 629.

4. In suit for *partition* against infants who appeared by guardians *ad litem*, and answered denying that plaintiff was owner, and that one W. was of a portion, and the Court rendered a decree forever barring all defendants of any claim to the premises: *Held*, said decree to be *coram non judice* and void; that the guardians *ad litem* had no power to admit away by their answer the rights of the infants, and the Court had no power to give effect to such admission, as it is a matter not within the scope of their appointment, or the purview of the complaint. *Waterman v. Lawrence*, 19 Cal. 210.

5. Guardians *ad litem* appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate; and their acts beyond this special limited power are void. *Id.*

6. It seems that there is no authority for the appointment of a guardian for an infant party for the purposes of a submission of a controversy without action; and that an infant has no power to consent to such submission. *Fisher v. Stilson*, 9 Abbott's Prac. Rep. 33 and 505.

### § 10. *Guardian, how appointed.*

The guardian shall be appointed as follows:

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years ; or if under that age, upon the application of a relative or friend of the infant.

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons ; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

N. Y. 116, J. P.

1. The provisions of the statute relating to the appointment of guardians *ad litem*, where infants are parties, only apply where there is no general guardian, or where he does not act. *Gronfier v. Puymisol*, 19 Cal. 629.

2. A guardian *ad litem* cannot be appointed for an infant over fourteen years of age without the infant's consent. 8 Abbott's Pr. Rep. 44.

3. The mother of a married infant, against whom a judgment of divorce had been obtained, applied to the Court by petition, setting forth facts tending to show collusion by the parties in obtaining the divorce, and asked to be appointed guardian *ad litem* for her daughter, and to have the judgment opened : *Held*, that her application must be denied, as she had no legal interest in the litigation ; but that it was the duty of the Court to direct a reference to ascertain if there had been any collusion. *Id.*

§ 11. *Father or mother may maintain action for injury to child.*

A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child ; and a guardian for the injury or death of his ward.

Voorh. N. Y. Code, 82, 143, d. e., J. P.

§ 12. *Who may be joined as plaintiffs.*

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this act.

N. Y. Code, § 117, J. P. ; see *post*, § 521, 658, 659 ; *vide* Van Sant. Eq. Pr. p. 74, 76.

1. **Action on joint, and joint and several contracts.**—Where a suit is brought upon a bill of lading to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo v. Stamburg*, 3 Cal. 465.

2. Where a joint contract was made by M. and C. for the purchase of a quantity of flour of defendants, and the defendants delivered one portion of the flour to M. and another to C. on their respective orders, and received payment from them severally, and settled with C., and then cancelled the contract with regard to him, and M. afterwards sued for damages alleged to have been sustained by him alone on the contract : *Held*, that if plaintiff relied upon the original contract between him and C., and the defendants, he could not sue without joining C. in the action. *McGilvery v. Moorhead*, 3 Cal. 267.

3. Where T. and C. executed a joint lease to L., to certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and



C., the lessors, brought a joint suit to recover the rent and restitution of the premises: *Held*, that there was no misjoinder of parties plaintiff. *Treat and Flower v. Liddell*, 10 Cal. 302.

4. The defendants agree with the plaintiff and two others to convey to them certain real property, and to construct a road from and exterior to the bounds of the premises, so that it should be passable within twenty-five days from date of the agreement, and should be completed within sixty days. The defendants conveyed the premises, but failed to construct the road. Some time after the breach, the other grantees transferred to the plaintiff the premises and all the privileges and rights which they purchased and received of the defendants, with the appurtenances, etc.: *Held*, that the plaintiff could not alone maintain an action for the breach.

1. The contract was not a continuing one, but the breach was single and indivisible, and the cause of action complete, and entire damages recoverable at the expiration of the sixty days, and only one action could be maintained. *Bendernagle v. Cocks*, 19 Wend. 207; *Sedgwick on Damages*, 224; *Shaffer v. Lee*, 8 Barb. 420; *Pool v. Pool*, 1 Hill, 580; *Fish v. Folley*, 6 Id. 521; *Shaffer v. Lee*, 8 Barb. 412; *Royalton v. R. and W. Turnpike Co.*, 14 Vt. R. 311; *Masterton v. The Mayor, etc., of Brooklyn*, 7 Hill, 61; *Stuyvesant v. The Mayor, etc., of New York*, 11 Paige, 414.

5. **Sheriff.**—The Sheriff who levies an attachment by virtue of the process of the Court, has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Melhado*, 1 Cal. 105.

6. **Promise of a third person, when plaintiff may sue on.**—Defendant purchased land of B., and as part of the consideration, agreed to pay certain debts of B. Neither plaintiff nor the person to whom the debts were owing were parties to this agreement, nor did they assent to it, or attempt to connect themselves with the transaction prior to this suit. Plaintiff is holder of these debts, and seeks to recover them of defendant: *Held*, that plaintiff cannot maintain the action, there being no privity between the parties, no novation of the indebtedness, and no assent to the transaction, which might make the agreement an equitable assignment. *McLaren v. Hutchinson*, 18 Cal. 80.

7. Defendant being indebted to E. M. Co., and they to plaintiff, all parties agreed that defendant should pay the amount of his indebtedness to the Company to the plaintiff: *Held*, that this was an equitable assignment of the debt, and that the only mode under our practice in which the assignment can be enforced, is by action in the name of the assignee to recover the debt. *Wiggins v. McDonald*, 18 Cal. 126; See *Laurence v. Fox*, 20 N. Y. R. (6 Smith) 268—a leading case.

8. **Insurance policy.**—On an insurance policy containing a provision that the loss is payable to a third party, a recovery cannot be had by the insured. The cause of action is in the third party, to whom the loss is payable. *Ripley v. Astor Ins. Co.*, 17 How. Pr. R. 444.

9. **Auctioneer.**—The memorandum of a sale was actually signed by the defendant, and by it he expressly agreed to pay the auctioneer the fees for which the suit was brought: *Held*, that whether this be treated as a stipulation with the owner to pay the auctioneer, or with the auctioneer himself, in either case the latter might sue for them in his own name. *Muller v. Maxwell*, 2 Bosw. 359.

10. **Reward.**—An agreement, by one who has lost property by fire or theft, to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a *nude pact*; but may be enforced by a person performing the service. *Ryer v. Stockvill*, 14 Cal. 134.

11. **Tax-payer.**—When a tax-payer may be plaintiff, stated. *Id.* 33.

12. **The state.**—An action upon a duty due by an auctioneer to the State under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State v. Poulterer*, 16 Cal. 532. In the absence of any statute, the State cannot be sued, and a judgment against her is erroneous. *The People v. Talmage*, 6 Cal. 256.

13. **Priest.**—The position of a priest who appears to have charge of church property, coupled with an interest, seems to be nearly analogous to that of a sole

corporation in England, and has power to sue as an inseparable incident to such corporation. *Sanhillan v. Moses*, 1 Cal. 94.

14. **Penalty.**—An action to recover a penalty for a violation of the law of 1847, concerning the pilotage of vessels in the East river, at Hell Gate, should be prosecuted in the name of master-warden of the port of New York, and not in the name of the people of the State. *The People v. Denning*, 1 Hill. 271.

15. **Religious Societies.**—Previous to May, 1849, there existed in New York three incorporated associations for similar objects, viz: the American Protestant Society, whose object was to diffuse through the United States the principles of the Protestant religion; the Foreign Evangelical Society, whose object it was to promote the moral and religious welfare of the inhabitants of foreign Christian countries; and the Christian Alliance, whose object it was to unite the Christians of all denominations in promoting religious freedom and knowledge in Papal countries. These associations were simultaneously dissolved, and the members of them associated themselves as the American and Foreign Christian Union, whose object was declared to be to diffuse religious liberty and pure Christianity, both at home and abroad, where a corrupt Christianity exists. The defendant's testator, who died shortly before the union of these societies, bequeathed a legacy, to be paid in six years from his decease, to the person who, at such time, should act as treasurer of American Protestant Society, the first above named: *Held*, 1. That the new society sufficiently represented the other to be entitled to the legacy. 2. That an action to recover it must be brought in the name of the treasurer of the new society, he being the real party in interest. *De Witt v. Chandler*, 18 How. Pr. R. 459.

16. An action was brought in the name of "The Trustees of the Methodist Episcopal Church in P.," against one who was a member of the Board of Trustees, for taking property of the society contrary to a by-law of the Board: *Held*, not maintainable. The defendant was also a plaintiff, which is fatal to an action. *Blaisdell v. Ladd*, 14 N. H. 129. An action at law cannot be maintained where the same person is one of the trustees, who are plaintiffs, and also sole defendant, or one of several defendants. A party can have no right of action against himself, either as debtor or tortfeasor. *Trustees of Methodist Episcopal Church in Poultney v. Stewart*, 27 Barb. 553.

17. The trustees of a religious society have possession and custody of the temporalities of the church, whether real or personal estate, and are the proper parties to bring an action for any injury to either. *Green v. Cady*, 9 Wend. 414; *The People v. Runkle*, 8 Johns. 364; S. C., 9 Id. 147. And the action being actually brought in their names, it is no answer to say that it is really an action by the corporation. *Trustees of M. E. Church in Poultney v. Stewart*, 27 Barb. 553.

18. A piece of land was conveyed to several persons by name, as "trustees of the H. Baptist Society." A house of worship was erected thereon by the society, but it was not incorporated. An action was brought by persons claiming as trustees of the society, and as successors to those who were named in the grant, to recover possession of the land: *Held*, that the plaintiffs could not maintain the action. Only the original grantees, or the society itself, when incorporated, had any rights in the premises. 8 Johns. 385; 9 Id. 73; 1859, *Bundy v. Birdsall*, 29 Barb. 31.

19. To a suit seeking to remove the present trustees of a corporation, they should be parties. *Reid v. The Evergreens*, 21 How. Pr. R. 319.

20. **Stockholders.**—A stockholder whose scrip has been stolen may maintain against the corporation, and a person who holds the stolen scrip, an action to establish his right to it. *Wells v. Smith*, 7 Abbott's Pr. 261.

21. **Counties.**—Suit brought for or against a county, shall be by or in the name of such county. Statutes of 1854, p. 194; Wood's Dig. p. 249, Art. 1377.

22. A county is a corporation, and is the proper party plaintiff to object to a contract made by the Board of Supervisors for building a jail. *Smith v. Myers*, 15 Cal. 33.

23. The people of a county are not a corporation, nor are they recognized in law as capable of suing or being sued. *Smith v. Myers*, 15 Cal. 34.

24. Under the Act of April, 1854, counties have the right of prosecuting and defending actions in the same manner as individuals. *Placer County v. Astin*, 8 Cal. 305.

25. In an action to restrain the mayor and commonalty of a city from granting certain ferry leases, upon the ground that they have no authority to make leases, and that if they have, they are making the same in a manner in violation of the charter of the city, and of the duties imposed on them as a municipal corporation to the public at large, the people are the proper parties plaintiff to enforce the remedy. They represent the general public—the body of citizens who are aggrieved. An individual would not be authorized to institute the action. *People v. Mayor, etc., of New York*, 32 Barb. 102.

26. The people not being the individual citizens of the State, but the aggregate body of the public, have no private rights to protect, and are not a proper party in an action by owners of land seeking to enjoin the construction of a railroad through the streets of a city. *People v. Law*, 34 Barb. 494; 22 How. Pr. 109.

27. But in such an action, brought on the ground that the grant by the Legislature to construct such a road is the grant of a franchise valuable in itself as a property right, and attempted to be disposed of without consideration, or for an insufficient consideration, and in violation of the provisions of the city charter, the city corporation is a necessary party. *Id.*

28. **Tenant in Common.**—§ 1. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may jointly, or severally, bring or defend any civil action for the enforcement or protection of the rights of such party. *Laws of 1857*, p. 62.

29. A tenant in common of lands, employed as agent by special agreement between himself and cotenant to take charge of the land, make sales thereof at certain prices—receiving a commission of five per cent. on sales—may sue his cotenant for the services rendered, in respect to the land, outside of selling it. *Thompson v. Salmon*, 18 Cal. 632. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisance, and may be maintained by tenants in common in a joint action. *De Johnson v. Sepulveda*, 5 Cal. 151; *Parke v. Kilham*, 8 Cal. 79.

30. It seems that all actions at common law to enforce the rights of owners or tenants in common, where one of them has died, must be brought in the name of the survivors only. *Bucknum v. Brett*, 13 Abbott's Pr. R. 119.

31. **Devisees.**—The devisees in remainder of premises, out of which rent issues, may maintain a joint action against the executor of the life tenant, for rent collected by him, which became due after the termination of the life estate. *Marshall v. Moseley*, 21 N. Y. (7. Smith) 280.

32. **Trover.**—All the parties in interest should join in an action of trover. *Whitney v. Stark*, 8 Cal. 514.

33. **Attorney.**—An attorney in fact does not hold the character of trustee, and is not a necessary party to a suit, to represent the interest of the principal. *Powell v. Ross*, 4 Cal. 197.

34. **Partnership creditors.**—In an action wherein the complaint alleges a purchase by the defendant of a firm's property, on a promise to prosecute business for a year, then sell it, and apply the proceeds and the profits of such business to pay all of said firm's creditors equally, all the creditors of the firm are necessary parties. *Colgrove v. Talmadge*, 6 Bosw. R. 289.

35. **Suits by and against partners.**—Partners cannot sue one another for any of the business or undertakings of the partnership. This can only be done in chancery by asking for a dissolution and an account. *Stone v. Fouse*, 3 Cal. 292.

36. One party cannot sue the other in an action at law. The remedy is by bill in equity for a dissolution and an account. *Barnstead v. Empire Mining Company*, 5 Cal. 299.

37. One partner cannot sue another for a partnership transaction, without praying for an account and a settlement of the partnership transactions. *Russell v. Ford*, 2 Cal. 86.

38. One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.

### § 13. *Who may be joined as defendants.*

Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

N. Y. Code, § 118; see *post*, §§ 527, 658, 659; Van Sant. Eq. Pr. 74, 76.

### ACTIONS AT COMMON LAW.

1. **General rules and miscellaneous decisions.**—It seems that the joinder of two persons as codefendants who have no joint interest in the subject matter of the suit, and are under no joint liability, will, unless the mistake be corrected in the Court below, be error. *Sterling v. Hanson*, 7 Cal. 478.

2. The fact that certain parties in interest are numerous and unknown is a sufficient excuse for not joining them as defendants. *Coe v. Backwith*, 10 Abbott's Pr. 296.

3. Although some of the parties may be mere accommodation grantees and fictitious depositaries of title, still they have a right to be heard at law in their own defense, before Courts of Chancery can pronounce definitely on their claims. *Knox v. Inches*, 12 Cal. 212.

4. Where property was seized under two attachments, and it was claimed by a third party, whereupon both attaching creditors indemnified the Sheriff, who went on and sold it, and paid the proceeds to the first attaching creditor, the amount not equaling his judgment, and afterwards the party claiming the property obtained judgment against the Sheriff for the value of the property: Held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Davidson v. Dallas*, 8 Cal. 227. As in that case the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. *Id.*

5. Where parties employed architects, reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam, or embankment, of certain specific dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time, and before the embankment was completed it was broken by a sudden freshet, and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs have brought suit to recover the damage sustained by them against the employers and contractors: Held, that the latter alone were liable. *Boswell v. Laird*, 8 Cal. 469.

6. The relation of the parties is that of independent contractors. The relation of master and servant, or superior and subordinate, did not exist between them, and therefore the doctrine *respondet superior* does not apply to the case. *Id.*

7. One action for damages may be brought against several defendants for an injury single in its nature, caused by their concurrent acts; e. g., against two railroad companies for injury by a collision between their respective trains; and a joint judgment is not improper if both are shown to be liable. *Colegrove v. The Harlem and New Haven R. R. Companies*, 6 Duer, 382.

8. The provision of section two hundred and seventy-four, that the judgment may determine the rights of the parties on each side between themselves, is to be taken in connection with that of section one hundred and eighteen, that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the questions involved therein; and it is only in those cases, and in the manner in which the conflicting claims of codefendants could be settled in the action, according to the practice of the Court of Chancery, that they can be settled under the code. *Wells v. Smith*, 7 Abbott's Pr. R. 261.

9. Where several have several interests in a fund, although the proportion of their respective shares is fixed, all must be made parties to an action by any one for

his share, if an accounting is necessary to be had to establish the amount of the fund. *Hallet v. Hallet*, 2 Paige, 19; *Dean v. Chamberlin*, 6 Duer, 691.

10. The complaint in a creditor's action alleged that the judgment debtor had made a fraudulent general assignment, with intent to hinder and delay his creditors, and that the assignee was guilty of a breach of faith in the management of the assets, and sought to set aside the assignment, and render the assignee personally liable. It also alleged that the debtor had, at various times, made several other conveyances, in fraud of creditors, to various persons made defendants in the action, which it also sought to have set aside: *Held*, that these facts constituted but one cause of action, and were properly set forth in one complaint. Though there be no privity between the several transferors in such case, there is a privity between each of them and the debtor, which makes it proper to join them all as defendants in an action to reach the property of that debtor. *Reed v. Stryker*, 12 Abbott's Pr. R. 47.

11. Where, in an action for fraud and deceit for the sale of stock, it appeared that defendant sold the stock through H., as his agent, and that the stock purchased by plaintiff through H. was in fact purchased by defendant, and that the land conveyed by plaintiff in payment was received by H. for defendant, and subsequently, and before the suit, conveyed to the latter: *Held*, that H. was not a necessary party. *Newberry v. Garland*, 31 Barb. 121.

12. Where a party rents property from another, and there are adverse claims to the rent, he should file his bill against all adverse claimants therefor, and offer to pay the rents into Court to abide the ultimate decision as to the party entitled to them. *McDevitt v. Sullivan*, 8 Cal. 592.

13. The holder of a note, holding also collateral securities as a pledge for its payment, assigned the securities to a third party: *Held*, that the holder of the note, as well as such assignee of the securities, was a necessary party to the debtor's action for an accounting. *Lewis v. Varum*, 12 Abbott's Pr. 305.

14. **Nonresident joint debtors need not be joined.**—In an action against joint debtors, some of whom are nonresidents, the nonresidents need not be joined, unless they have property in this State. 1 B. & Adol. 398, 1859; *Brown v. Birdsall*, 29 Barb. 549.

15. **Assignor, when a necessary defendant.**—It seems that where a bond has been assigned as collateral security for a debt—the assignment to be void when the debt is paid—the assignor is a necessary party to an action brought by the assignee upon the bond. Code, §§ 117, 118, 122, 1859; *Western Bank v. Sherwood*, 29 Barb. 383, 387.

16. **Counties.**—At common law an action did not lie against a county, and this was the law of this State until the eighteenth of May, 1854. The law passed May 1st, 1854, exempting the property of counties from a forced sale under execution, did not affect the obligation of plaintiff's contract with the county, for it was but an affirmation of the common law. *Gilman v. Contra Costa County*, 8 Cal. 52.

17. The people of a county are not a corporation, nor can they sue or be sued. *Smith v. Myers*, 15 Cal. 33.

18. Boards of Supervisors cannot be sued in their official character, in ordinary common law actions, for claims against the public, county or village they represent, without express statutory provision. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

19. The statute providing that no person shall sue a county for any demand, unless the claim has first been presented to the Board of Supervisors, and been by them rejected, applies as well to actions arising out of tort as upon contract. *McCann v. Sierra County*, 7 Cal. 121.

20. Suits brought for or against a county shall be by or in the name of such county. Stat. 1854, 194; Wood's Dig. 249, art. 1377. So where the grounds of relief are based upon the abuse of power by the city corporation, its agents or servants, the parties whose action is impeached are necessary parties. *Id.*

21. A statute having been enacted granting to individuals the right to construct a railroad in the streets of New York city, the fee whereof belongs to the corporation of the city, an action was brought by the people of the State and individuals

owning lots upon such streets, to enjoin the construction of the road, on the ground of the invalidity of the statute: *Held*, that the corporation were not proper parties defendant, it not being shown that their interests were adverse to the plaintiffs. *People v. Mayor, etc., of New York*, 20 How. Pr. 244; see No. 23, *et seq.*

### ACTIONS IN EQUITY.

**22. Attorney at law.**—Where an attorney is charged with being a party to a fraud in obtaining a judgment for his client, in a suit brought to set aside the judgment, he may be properly joined with his client as defendant. *Crane v. Hirschfelder*, 17 Cal. 467.

**23. Bill for an injunction.**—In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the Fund Commissioners created by the Act of April 20th, 1858, for the claims approved by the Board of Examiners, it is necessary that some of the persons to whom the bonds are to be issued should be parties to the action. *Hutchinson v. Burr*, 12 Cal. 103.

**24.** In an action to restrain the issuance of bonds by an incorporated company, the persons to whom the bonds are to be issued are necessary parties to such action. *Patterson v. Yuba County*, 12 Cal. 105.

**25.** It would also be a fatal objection to a bill in equity by defendant, to set aside the patent in this case for fraud in its procurement, that Fremont, the patentee, is not a party. He would be a necessary party to any proceeding to avoid or set aside his patent, on the ground that it was issued through fraud or misrepresentation. His rights cannot be determined or impaired in any side suit between third parties. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

**26. Bill to quiet title.**—The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them: *Held*, that the latter were unnecessary parties, as the grantee in the deed, and those claiming under him, were the only parties necessary to the complete adjudication of the case. *Peralta v. Simon*, 5 Cal. 313.

**27. Bill to compel the execution of a trust.**—Where the complaint charged that A was indebted to plaintiff, and had conveyed his property to B to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B, who had accepted it, and further charged that B had subsequently reconveyed a portion of the property to A, without consideration, praying that B be compelled to execute the trust in favor of plaintiff: *Held*, that A was a proper and necessary party to the action. *Lucas, Turner & Co. v. Payne*, 7 Cal. 92.

**28. Arbitrators.**—In an action to set aside an award, it never was proper to join the arbitrators as defendants, unless they were charged with fraud or gross misconduct, and a discovery sought from them. *Story's Eq. Jur.* §§ 1498, 1500; *Story's Eq. Pl.* § 232; 8 How. (U. S.) 134; *Knowlton v. Mickles*, 29 Barb. 465. *Query*: Whether, under the Code, the arbitrators can in any case be necessary parties. *Id.*

**29. Bill to set aside liens by judgment, &c., for fraud.**—Where several judgment creditors, claiming under different judgments against the same debtor, join in a suit to set aside various liens, by judgment and by assignment of property, for fraud, and to have the property applied to the payment of the plaintiff's debts, they may join as defendants with the judgment debtor all persons having liens or conveyances by which they claim different portions of the debtor's property, notwithstanding they received the property in separate and distinct parcels and at different times, and each claims to hold the portion in his hands by virtue of a separate lien or conveyance. *Morton v. West*, 33 Barb. 30.

**30. Spurious stock.**—In an action by a corporation whose agents have issued spurious stock, brought against the holders of such stock, and seeking to have the same declared void, the holders of genuine stock are not proper parties. *New York & New Haven R. R. Co. v. Schuyler*, 8 Abbott's Pr. 239.

31. **In proceedings in insolvency.**—Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge, or obtaining his proportion of the assets, whether he be named in the assignment or not. *Lambert v. Slade*, 4 Cal. 337.

### PARTNERS, LIABILITY OF.

32. A consignment of merchandise was made to defendants as partners; after the dissolution of the partnership, two sales of a portion of the merchandise were made—one by each partner, who severally received the money: *Held*, that the partnership continued for the purpose of fulfilling engagements, and the defendants were jointly liable. *Johnson v. Totten*, 3 Cal. 343.

33. The plaintiff consigned goods to McL., who sold them and received the proceeds. McL. was the partner of a firm, (and one of the defendants) which being in want of funds proposed to another partner, B., (also a defendant) to loan the money of plaintiff, in his hands, for the purposes of the firm, to be repaid when funds of the firm could be had; which was consented to, and the money advanced under this arrangement. The firm was sued for the money so loaned: *Held*, that there was no privity between the plaintiff and defendants on which to establish the relation of debtor and creditor; that McL., as agent of plaintiff, had no authority to loan the money to the defendants, and it can only be regarded as an advance by one partner to the partnership concern, for which they are liable to him, and that McL. alone is liable to plaintiff. *Evans v. Bidleman*, 3 Cal. 435.

34. Where the plaintiff had no knowledge, until the trial, that a third party was a secret partner of the defendant, the nonjoinder of such third party cannot be objected to by the defendant. *Tomlinson v. Spencer*, 5 Cal. 291.

35. The plaintiff alleged that Hull & Co. were indebted to him, but failed to prove that there were others in company with Hull in the transaction: *Held*, that the words "and company" might be treated as surplusage, and the action proceed as against Hull alone. *Mulliken v. Hull*, 5 Cal. 245.

36. A & B were in partnership. B took forcible possession of the partnership property and sold it to C & D: *Held*, that A cannot maintain an action for the partnership property and profits against B, C and D. *Mason v. Tipton*, 4 Cal. 276.

37. The personal representative of a deceased partner cannot be joined as defendant with a surviving partner in an action for a partnership debt, where the complaint does not show the plaintiff's inability to collect from the survivor. Such a complaint is bad as against the representative on his separate demurrer, on the ground that it does not state facts sufficient to constitute a cause of action against him. *Voorhies v. Childs*, 17 N. Y. (3 E. P. Smith) R. 354.

38. The creditors of a firm having secret partners have the right, but are not compelled, to join such partners as defendants in an action against the firm. 1 B. & Adol. 398, 1859; *Brown v. Birdsall*, 29 Barb. 549.

39. In an action against partners, a dormant partner, unknown to the plaintiff at the time of the making of the contract, need not be joined as defendant, although he was known to the plaintiff before the commencement of the action. *N. Y. Dry Dock Co. v. Treadwell*, 19 Wend. 525; *Clarkson v. Carter*, 3 Cow. 84; *Clark v. Miller*, 4 Id. 628; *Mitchell v. Dall*, 2 Har. & Gill. 159, 171; *Hurlbert v. Post*, 1 Bosw. 28.

§ 14. *Parties in interest, when to be joined. When one or more may sue or defend for the whole.*

Of the parties to the action, those who are united in interest shall be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and

it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

N. Y. Code, § 119, J. P.; Van Sant. Eq. Pl. 76-80.

1. The fourteenth section of the Practice Act was intended to apply to suits in equity, and not to actions at law. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

2. The rule requiring all persons materially interested to be made parties to a suit is dispensed with, when it is impracticable or very inconvenient, as in cases of joint associations composed of numerous individuals. *Gorman v. Russell*, 14 Cal. 531; *Van Schmidt v. Huntington*, 1 Cal. 55.

3. When one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. *Query*: Whether such nonjoinder of parties plaintiff is permissible. *Nightingale v. Scannell*, 6 Cal. 506. The law will not tolerate a division of a joint right of action into several actions. *Id.*

4. In an action upon a bond or written undertaking, there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flinket*, 4 Cal. 88.

5. All the parties having a part interest in the subject matter should be joined as plaintiffs, but the defect must be taken advantage of by answer or apportionment of damages, where it does not appear on the face of the complaint. *Whitney v. Stark*, 8 Cal. 514; 6 Bosw. 625.

6. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments without any excuse: *Held*, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their gross negligence or willful misconduct. *Neall v. Hill*, 16 Cal. 145.

7. If a new action by the defendants in a judgment can be maintained to declare void the judgment, (4 How. Pr. 350; 8 Id. 416) it cannot be without joining, as plaintiffs or defendants, all the defendants in the judgment. They would be necessary parties if the action were maintainable. *Bowers v. Tallmadge*, 16 How. 325.

8. Section one hundred and nineteen of the Code, which provides that one or more may sue or defend for the benefit of the whole, does not apply to the case where the right to assert or protect which the suit is brought is not one which exists against them all, or the obligation, which it is sought to enforce, is not common to all. Thus, where the complaint showed that there were several kinds or classes of bonds issued by the corporation defendant, and that these bonds were held by persons who had received them for different considerations and under various circumstances, and alleged in respect to the sole defendant prosecuted with the corporation, that he was probably the largest holder of such bonds as are without consideration, or otherwise invalid, and that he was made a party as representing that class of persons: *Held*, that the suit was defective for want of the others as parties. These various bondholders could not be bound by a judgment to which they were not parties, merely because the person who was made a defendant was a holder of bonds which were invalid for some of the various causes affecting them to a greater or less extent. *Reid v. The Evergreens*, 21 How. 319.

9. The complaint alleged that the plaintiffs and one of the defendants were a copartnership, and the defendants were another copartnership; that the latter firm was indebted to the former firm on an account stated, on which it demanded a recovery; and that the reason why the defendant, who was a member of both firms, was made defendant only, was that he had refused to join as plaintiff: *Held*, that the action was maintainable. 1. Under the Code it is no objection that one of the parties was a member of both firms. It is enough in such case that the proper parties are before the Court, whether as plaintiffs or defendants, to enable it to pronounce judgment according to the facts. *Cole v. Reynolds*, 4 E. D. Smith (18 N. Y.) 75; *Bishop v. Edmiston*, 13 Abb. 346.

10. Where the owners of a vessel were parties united in interest within the meaning of section one hundred and nineteen of the Code: *Held*, that all should join as plaintiffs in the prosecution of a demand growing out of such ownership.



The plaintiffs in this case not having taken the requisite steps, under section one hundred and nineteen, to make one of them a defendant in the action, held that they could not make one of the part owners a party defendant, and omit to join him as a party plaintiff with themselves. *Bishop v. Edmiston*, 13 Abbott, 346.

§ 15. *One action may include different parties on obligations, etc.*

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

N. Y. Code, § 120, J. P.; Van Sant. Pl. 169.

1. This section is in derogation of the old rule of common law, that one or all, and not any intermediate number, may be sued. *Stearns v. Aguirre*, 6 Cal. 183.

2. In all cases of joint and several contracts the plaintiff may elect whether he will sue the defendants severally or jointly. *Id.* 176.

3. To create a several liability express words are necessary. *Brady v. Reynolds*, 13 Cal. 31.

4. Where a promissory note was made payable to S., and previously to its delivery to the payee, was indorsed for the accommodation of the maker by H. and brother and defendant, upon an agreement of the indorsers with each other that each would become surety if the other would: *Held*, that the indorsers were guarantors, and were jointly and not severally liable in a suit by the payee, or a third person taking the note after maturity. *Id.*

5. Where a Sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the Sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the Sheriff. Each bond must be sued on as an independent obligation. *White v. Pratt*, 13 Cal. 521.

6. Under section one hundred and twenty of the Code of Procedure, which provides that persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff. A joint action lies against a lessor and a surety, who is a party to the lease and therein guaranties the performance of the lessor's covenants. *Charman v. Plass*, 23 N. Y. 286.

7. A joint action lies under section one hundred and twenty of the Code against a lessor and one who is a party to the lease, and therein guaranties the performance of the lessor's covenants. *Id.*

§ 16. *Action, when not to abate by death, marriage or other disability.*

An action shall not abate by the death or other disability of a party; or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or other disability of a party, the Court on motion may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action.

N. Y. Code, § 121, J. P.

1. The sixteenth and seventeenth sections of the Practice Act, and the seventy-second, seventy-third and seventy-fourth sections of the amendments of 1854 to the Practice Act, give a party the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or where he is directly interested in the subject matter in litigation, and this can be done either before or after issue has been joined in the case. *Brooks v. Hager*, 5 Cal. 281.

2. The death of the wife, after suit brought by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit. *Gee v. Moore*, 14 Cal. 472.

3. In a suit in chancery for partition, one of the defendants died after the bill had been taken as confessed as against him. The suit was prosecuted to judgment without bringing in his heirs, (who were not parties to the suit) and after sale under the judgment and delivery of the master's deed, an order was made reviving the suit against his heirs, who thereafter made applications to the Court in relation to the disposition of the proceeds: *Held*, that the heirs were not bound by the decree. By the death of their ancestor the action became defective, and the title which he had at the time of his death could not be affected without bringing in those who succeeded to his interests. *Russell v. Sharp*, 1 Ves. and B. 500; *Randall v. Mumford*, 18 Ves. 424; Story's Eq. Pl. §§ 329, 331, 354, 369; Hind's Ch. Pr. 46; 1 R. L. 514, 488; *Washington Ins. Co. v. Slee*, 1 Paige, 365; *Kelly v. Hooper*, 3 Yerg. 395; *Garr v. Gomez*, 9 Wend. 649; 2 Pet. 482, 487; *Vroom v. Dimas*, 5 Paige, 528; *Williams v. Kinder*, 4 Ves. Sr. 487.

4. In an action under the Code, to recover the possession of land, corresponding to the former action of ejectment, the death of a sole defendant before the verdict abates the action; and the Court has no power to authorize the continuance of the action, by supplemental complaint or otherwise, against his heirs at law. *Mosely v. Mosely*, 11 Abbott's Pr. 105.

5. If a sole defendant die pending an action, after issue joined therein and before trial, his personal representatives have no right to an order requiring the plaintiff to continue the action against them as the defendants therein. In such a case the plaintiff, at his election, may require it to be discontinued. *Souillard v. Dias*, 9 Paige, 393; *Keene v. La Farge*, 1 Bosw. 671; 16 How. Pr. 377.

6. An order of revivor, in the name of A "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A can recover all that the testator might have recovered. *Underhill v. Crawford*, 29 Barb. 664; 18 How. Pr. 112.

7. Section one hundred and twenty-one of the Code, which provides that in case of a transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action, contemplates a transfer other than by death—contemplates an existing, pending action—and the substitution of one person in the place of another; not a case where the action has abated by the death of a party. *Kissam v. Hamilton*, 20 How. Pr. 367.

8. If a party dies pending a motion, the decision of which will not finally determine the action, an order of revival must be had before the decision of such motion can be entered. *Reed v. Butler*, Id. 128.

### § 17. Court, when to decide controversy, or to order other parties to be brought in.

The Court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court shall order them to be brought in.

N. Y. Code, § 122, J. P.; Van Sant: Eq. Pr. 82.

1. The provisions of sections sixteen and seventeen sustained. *Brooks v. Thayer*, 5 Cal. 281.

2. It is the duty of a Court of Equity, when all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for future litigation, if it can be helped. *Ord v. McKee*, 5 Cal. 515.

3. When a husband sues to recover a homestead, and the wife does not appear in the action, the Court should order her to be brought in, so that a final decree may be binding upon them. *Marks v. Marsh*, 9 Cal. 96.

4. The right to demur was given to enable the Court to carry out the provisions of the foregoing section. *Warner v. Uncle Sam*, 9 Cal. 697.

5. A Court of Equity will not permit litigation by piecemeal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever. *Wilson v. Lassen*, 5 Cal. 114.

6. The receiver of a judgment debtor brought an action against a grantee of the latter, to set aside his conveyance as fraudulent, without making the debtor a party. The defendant did not raise the objection by demurrer or answer, nor upon the trial: *Held*, on appeal, that the debtor was an indispensable party, whose absence could not be waived by the defendant. It was the duty of the Court to cause him to be brought in. Judgment for plaintiff reversed, with leave to amend by adding the debtor as a party. Code, § 122; 4 Paige, 75; 7 Barb. 221; 1 Pet. 138, 139; 2 Duer, 663; 3 Id. 121, 1859; *Strover v. Brainard*, 29 Barb. 25.

7. In an action by a creditor of a corporation for the recovery from a stockholder of a debt of the corporation, omission to make the corporation a party is not ground for demurrer. It is only where the parties are united in interest that they must be brought in by the plaintiff. In other cases, if necessary, the Court may order such to be made parties. *Perkins v. Church*, 31 Barb. 84.

8. The Court will not order new parties defendant to be brought in against the will of the plaintiff, unless their presence is necessary to the determination of the action. *Sawyer v. Chambers*, 11 Abbott's Pr. R. 110.

9. A judgment, declaring the rights of parties in a fund in Court, reversed because persons who made claims upon it were not made parties. *Valentine v. Wetherill*, 31 Barb. 655.

10. The Court will not grant an order substituting third parties as defendants in place of the original defendants, unless the facts clearly justify the substitution, and the proof is satisfactory that the change of parties can work no real prejudice to the plaintiff. If the proposed defendants have not appeared, upon the motion, and made their claim, or signified to the Court its particular character, so as to enable the Court discreetly to judge whether the plaintiff will not be prejudiced by the substitution of parties, and have not disclosed their willingness to assume the position of real defendants, nor their pecuniary ability to respond for the costs of an unsuccessful litigation, the motion should be denied, especially if they are nonresidents. *Lund v. Seaman's Bank*, 20 How. Pr. 461.

## TITLE II.

### OF THE PLACE OF TRIAL OF CIVIL ACTIONS.\*

#### SEC. 18. *Actions to be tried where subject matters situated.*

\* STATUTES OF 1864, 158; WOOD'S DIGEST, ART. 1878.

*An Act Relative to Transferring Actions and Proceedings from one Court to another Court. Passed May 6th, 1864.*

1. If an action or proceeding is commenced or pending in a Court, as is hereinafter mentioned, and the Judge or Justice thereof is by law disqualified from acting as such, or if for any other cause the Court orders the place of trial to be changed, it shall be transferred for trial to a Court the parties may agree upon, by stipulation in writing, or made in open Court

SEC. 19. *Actions to be tried where cause of action arose.*

20. *Actions to be tried where parties reside.*

21. *Change of place of trial.*

§ 18. *Actions to be tried where subject matter situated.*

[1861.] Actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the Court to change the place of trial, as provided in this act:

1st. For the recovery of real property, or of an estate, or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2d. For the partition of real property.

and entered in the minutes; or, if they do not so agree, then to the nearest Court where the like objection or cause for making the order does not exist, as follows:

1st. If in the District Court, to another District Court.

2d. If in a County Court, to a District Court, or some other County Court.

3d. If in the Probate Court, to a District Court, or some other Probate Court.

4th. If in a Justice's Court, to another Justice's Court in the same county.

2. When an order is made transferring an action or proceeding for trial, the Clerk of the Court, or Justice of the Peace, shall transmit the pleadings and papers therein to the Clerk or Justice of the Court to which it has been transferred. If the transfer is made on the ground that a Judge or Justice is disqualified from acting, the cost and fees thereof, and of reentering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases they are to be paid by the party at whose instance the order is made.

3. The Court to which an action or proceeding is transferred shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, and may by order or execution enforce the judgment.

4. In an action or proceeding transferred from a Probate Court, or brought to recover the possession of lands or tenements, (excepting it be in a Justice's Court) after final judgment therein, the Clerk of the Court in which it is heard shall certify under his seal of office, and transmit to the Court from whence it is transferred, a full transcript of the proceedings and judgment. The Clerk receiving such transcript shall docket and record the judgment in the records of his Court, briefly designating it as a judgment transferred from — Court (naming the proper Court).

5. On transferring causes, the following and no other fees and costs shall be allowed to the Clerks of the Court: For transmitting the pleadings and papers of a cause, the sum of two dollars; for reentering and filing the same pleadings and papers anew, three dollars; for certifying and remitting a transcript and judgment, when required to be done under this act, five dollars; for docketing and recording a transcript and judgment, when required to be done under this act, five dollars. The last two items may be taxed in favor of the successful party, and made a part of the judgment against the other party, or otherwise ordered paid, as the Court hearing the action or proceeding may, by its order or judgment, direct.

6. If an action or proceeding is transferred to a Justice's Court, the Justice receiving it shall, three days before he proceeds to the trial thereof, unless the parties stipulate, in writing, to waive such notice, cause therein a notice in writing to be served on the parties, which notice shall inform them of the time and place of trial; in other cases, the action or proceeding shall proceed in the same manner provided for by law in such actions or proceedings.

7. On application for a citation on production of a writ of error from the Clerk of the United States Court, and for a stay of proceedings in the Supreme Court of this State, the duty and power of issuing the citation devolves on the Chief Justice, as a chamber proceeding, and he must see, when he is required to act or authorized to proceed under the Federal law, that he is within that law. *Ferris v. Coover*, 11 Cal. 175.

8. An action of ejectment, raising the question whether a grant made by the Mexican Government passed title to the tract within the limits of the grant, is not a case in which a writ of error lies under the Judiciary Act. *Id.*

2. It is the duty of a Court of Equity, when all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for future litigation, if it can be helped. *Ord v. McKee*, 5 Cal. 515.

3. When a husband sues to recover a homestead, and the wife does not appear in the action, the Court should order her to be brought in, so that a final decree may be binding upon them. *Marks v. Marsh*, 9 Cal. 96.

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10. The Court will not grant an order substituting third parties as defendants in place of the original defendants, unless the facts clearly justify the substitution, and the proof is satisfactory that the change of parties can work no real prejudice to the plaintiff. If the proposed defendants have not appeared, upon the motion, and made their claim, or signified to the Court its particular character, so as to enable the Court discreetly to judge whether the plaintiff will not be prejudiced by the substitution of parties, and have not disclosed their willingness to assume the position of real defendants, nor their pecuniary ability to respond for the costs of an unsuccessful litigation, the motion should be denied, especially if they are nonresidents. *Lund v. Seaman's Bank*, 20 How. Pr. 461.

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1. If an action or proceeding is commenced or pending in a Court, as is hereinafter mentioned, and the Judge or Justice thereof is by law disqualified from acting as such, or if for any other cause the Court orders the place of trial to be changed, it shall be transferred for trial to a Court the parties may agree upon, by stipulation in writing, or made in open Court

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and entered in the minutes; or, if they do not so agree, then to the nearest Court where the like objection or cause for making the order does not exist, as follows:

1st. If in the District Court, to another District Court.

2d. If in a County Court, to a District Court, or some other County Court.

3d. If in the Probate Court, to a District Court, or some other Probate Court.

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2. When an order is made transferring an action or proceeding for trial, the Clerk of the Court, or Justice of the Peace, shall transmit the pleadings and papers therein to the Clerk or Justice of the Court to which it has been transferred. If the transfer is made on the ground that a Judge or Justice is disqualified from acting, the cost and fees thereof, and of reentering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases they are to be paid by the party at whose instance the order is made.

3. The Court to which an action or proceeding is transferred shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, and may by order or execution enforce the judgment.

4. In an action or proceeding transferred from a Probate Court, or brought to recover the possession of lands or tenements, (excepting it be in a Justice's Court) after final judgment therein, the Clerk of the Court in which it is heard shall certify under his seal of office, and transmit to the Court from whence it is transferred, a full transcript of the proceedings and judgment. The Clerk receiving such transcript shall docket and record the judgment in the records of his Court, briefly designating it as a judgment transferred from — Court (naming the proper Court).

5. On transferring causes, the following and no other fees and costs shall be allowed to the Clerks of the Court: For transmitting the pleadings and papers of a cause, the sum of two dollars; for reentering and filing the same pleadings and papers anew, three dollars; for certifying and remitting a transcript and judgment, when required to be done under this act, five dollars; for docketing and recording a transcript and judgment, when required to be done under this act, five dollars. The last two items may be taxed in favor of the successful party, and made a part of the judgment against the other party, or otherwise ordered paid, as the Court hearing the action or proceeding may, by its order or judgment, direct.

6. If an action or proceeding is transferred to a Justice's Court, the Justice receiving it shall, three days before he proceeds to the trial thereof, unless the parties stipulate, in writing, to waive such notice, cause therein a notice in writing to be served on the parties, which notice shall inform them of the time and place of trial; in other cases, the action or proceeding shall proceed in the same manner provided for by law in such actions or proceedings.

a. On application for a citation on production of a writ of error from the Clerk of the United States Court, and for a stay of proceedings in the Supreme Court of this State, the duty and power of issuing the citation devolves on the Chief Justice, as a chamber proceeding, and he must see, when he is required to act or authorized to proceed under the Federal law, that he is within that law. *Ferris v. Coover*, 11 Cal. 175.

b. An action of ejectment, raising the question whether a grant made by the Mexican Government passed title to the tract within the limits of the grant, is not a case in which a writ of error lies under the Judiciary Act. *Id.*

3d. For the foreclosure of a mortgage of real property.

*Provided, that where such real property is situate partly in one county and partly in another, the plaintiff may select either of said counties, and the county so selected shall be the proper county for the trial of any or all of such actions as are mentioned in the first, second and third subdivisions of this section.*

N. Y. Code, § 123.

**1. Probate proceedings not within the act.**—Probate proceedings are not civil actions within the meaning of this section. *Estate of C. G. Scott*, 15 Cal. 220.

STATUTES OF 1855, 80; WOOD'S DIGEST, 250, ART. 1379.

*An Act to provide for certifying and removing certain cases from the Courts of this State to the United States Circuit Courts, and to remove by writ of error certain cases from the Supreme Court of this State to the Supreme Court of the United States. Passed April 9th, 1855.*

1. If a suit be commenced in any Court of this State against an alien, or by a citizen of this State against a citizen of another State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such a Court of this State, file a petition for the removal of the cause for trial into the next Circuit Court of the United States, or District Court of the United States, having the powers and jurisdiction of a Circuit Court, to be held in the District where the suit is pending, and offer good and sufficient surety for his entering in such Court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if bail was originally requisite therein, it shall then be the duty of such Court of this State to accept the surety and proceed no further in the cause; and all subsequent proceedings which may be taken or had in such Court, in contravention of the provisions of this section, shall be void, and of no force or effect for any purpose whatsoever.

2. A final judgment or decree in any suit in the highest Court of law or equity of this State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute thereof, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under this State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such, their validity; or where is drawn in question the construction of any clause of the Constitution of the United States, or of a treaty, or of a statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be removed by writ of error to, and be reexamined and reversed or affirmed in the Supreme Court of the United States, in the manner prescribed by the laws of the United States; and upon the issuance and service of such writ of error, the Chief Justice, or any Judge of the Court rendering or passing the judgment or decree complained of, upon being applied to by the plaintiff in error, or his attorney, shall sign the requisite citation to the adverse party.

3. After a final judgment shall have been rendered in any suit in the highest Court of this State, if the party against whom the decision may have been given shall within ten days thereafter file notice, in writing, with the Clerk, of his intention to remove the cause by writ of error to the Supreme Court of the United States, and shall offer sufficient security, to be approved by the Judge of the Supreme Court, or any District Court of this State, for the prosecution of such writ of error, it shall be the duty of the said Court in which such final judgment was rendered, or any Judge thereof at chambers, to stay all proceedings for such time not exceeding four months, to be fixed by the said Court or Judge, as will be sufficient to enable such party to apply for and serve his writ of error in the mode prescribed by the laws of the United States, and upon the receipt of such writ of error, the Clerk of the Court in which the record may be, and to which the writ may be directed, shall make return thereto, and send up the record or a transcript, without the necessity of any other or further order or authority whatsoever.

4. If any Judge, Clerk, or other officer of any Court of this State, shall knowingly and voluntarily act in contravention of the provisions of this act, he shall be deemed guilty of a misdemeanor in office, and liable to impeachment and removal from office.

a. One of several parties, defendants to a cause pending in one of the Courts of this State, filed his affidavit for its removal to the United States District Court, on the ground that he was an alien: *Held*, that it must appear that the contest was between a citizen of this State and citizens of a foreign State. *Welch v. Tennent*, 4 Cal. 203.

2. **Mining claims.**—Mining claims are real estate within the meaning of this act, and are governed by the provisions of this section. *Watts v. White*, 12 Cal. 321.

3. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy; and in such case there is no discretion in the Court, the change being matter of right. *Id.*

4. In actions to recover real property, the complaint need not state the residence of either of the parties. The statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Doll v. Feller*, 16 Cal. 433.

5. *Query*: Whether, in a foreclosure suit, in the Seventh District, as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco before the Judge of the Seventh District, under a stipulation, and without exception to the place of trial, and afterwards assign that fact as error. *De Leon v. Higuera*, 15 Cal. 495.

6. **Rights may be waived.**—The right to have a cause tried in a particular county is one which a party may waive, either expressly or by implication. *Pearkes v. Freer*, 9 Cal. 642.

7. The privilege must be claimed by motion to change the venue, at the proper time and place. *Watts v. White*, 13 Cal. 324, overruling *Vallejo v. Randall*, 5 Cal. 462. The motion should be made before, or at the time of, filing a demurrer, or in the answer. *Pearkes v. Freer*, 9 Cal. 642.

### § 19. *Actions to be tried where causes of action arose.*

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the Court to change the place of trial:

1st. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offense committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

2d. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer.

N. Y. Code, § 124.

1. Proceedings for a mandamus to compel the execution of a Sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the Code, can be commenced in the county where the relator resides. The provision of the statute that actions against a public officer for acts done by him in virtue of his office, etc., set forth in this section, applies only to affirmative acts of the officer, by which in the execution of process, or otherwise, he interferes with the property or right of third persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 420.

### § 20. *Actions to be tried where parties reside.*

[1858.] In all other cases the action shall be tried in the county in which the defendants or any of them may reside at the com-



mencement of the action; or, if none of the defendants reside in the State, or, if residing in this State, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the State, such action may be tried in any county where either of the parties may reside, or service be had, subject, however, to the power of the Court to change the place of trial, as provided in this Act.

N. Y. Code, § 125. See *post*, § 21.

1. **Probate proceedings not within the Act.**—Proceedings for the settlement of an estate, and matters connected therewith, are not civil actions within the meaning of this Title 2d, so as to transfer them from one county to another. *Estate of Scott*, 15 Cal. 220.

2. **Right of defendant.**—Defendant has a right to have the action tried in the county of his residence, except in certain cases specified in the statute. *Field, C. J., Id.*

3. **May be waived.**—The right is one which a party may waive, either expressly or by implication. *Pearkes v. Freer*, 9 Cal. 642.

4. It is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 5 Cal. 462.

5. **Exception to the general rule.**—Where the same fraudulent debtor confesses several fraudulent judgments in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. And where there is an exception to the general rule, it is the business of the plaintiff to show in his complaint that he comes within it. *Uhlfelder v. Levy*, 9 Cal. 607.

6. **Habeas Corpus.**—The writ of *habeas corpus* should not issue to run out of the county, unless for good cause shown, as the absence, inability or refusal to act, of the local Judge, or other reason showing that the object and reason of the law requires its issuance. *Ex parte Ellis*, 11 Cal. 225.

### § 21. *Change of place of trial.*

The Court may, on motion, change the place of trial in the following cases:

1st. When the county designated in the complaint is not the proper county.

2d. When there is reason to believe that an impartial trial cannot be had therein.

3d. When the convenience of witnesses and the ends of justice would be promoted by the change.

4th. When, from any cause, the Judge is disqualified from acting in the action.

N. Y. Code, § 126. See *ante*, § 18, note.

1. Causes may be removed from one district or county to another county or district, in the manner provided by the statute. *Reyes v. Sanford*, 5 Cal. 117.

2. **When motion must be made.**—The motion should be made before or at the time of filing a demurrer, where the grounds are apparent on the face of the complaint—(*Pearkes v. Freer*, 9 Cal. 642); or before, as in the answer. It comes too late after an answer to the merits. *Tooms v. Randall*, 3 Cal. 438; *Reyes v. Sanford*, 5 Id. 117.

3. **Granting motion discretionary.**—The granting of a change of venue is discretionary with the Court below, subject to review only in cases of gross abuse. The affidavit should state sufficient facts to draw from the Court its own inference as to the impartial trial. *Sloan v. Smith*, 3 Cal. 410.

4. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And in such case, there is no discretion in the Court, the change being a matter of right. *Watts v. White*, 13 Cal. 321.

5. **The right may be waived.**—The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed, by motion to change the venue, at the proper time and place. *Watts v. White*, 13 Cal. 321.

6. **The Court will not move in the first instance.**—The Court is not bound, by its own motion, to change the venue. *Vallejo v. Randall*, 5 Cal. 461, overruled so far as it conflicts with *Watts v. White*, 13 Cal. 321.

7. The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the Court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue, on the ground that the Judge is disqualified from sitting. The law establishes a different rule for determining the qualification of Judges from that applied to jurors. *McCauley v. Weller*, (Terry, C. J.) 12 Cal. 500.

8. **Practice on motions—sufficiency of affidavits.**—Where the defendant has a right to a change of the place of trial, the plaintiff may resist a motion for a change of venue, by alleging in opposition the convenience of witnesses; and this opposition may be manifested through a counter motion, or by counter affidavits offered in the original motion—in which latter case, a reasonable time should be given the defendant, if denied, to meet the matter set up in opposition to the original motion. The evidence as to the convenience should be as full and particular as that which is required upon an application for this cause to transfer the trial to another county. The affidavit must state the names of the witnesses. (Field, C. J.) *Loehr v. Latham*, 15 Cal. 418.

9. A willful or careless ignorance of the residence of the defendant does not put it in the power of the plaintiff to sue him in any county of the State, however remote from his residence. \* \* \* To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of the defendant before suit, and failed. (Per Baldwin, J.—Cope J. concurring.) *Id.*

## TITLE III.

## OF THE MANNER OF COMMENCING CIVIL ACTIONS.\*

- SEC. 22. *Actions, how commenced.*  
 23. *Complaint, how indorsed; when summons may issue, how signed and issued.*  
 24. *Summons, requisites of.*  
 25. *Summons, time to answer.*  
 26. *Summons, what notice to be inserted therein.*  
 27. *Lis pendens, filing and effect of.*  
 28. *Summons, by whom served.*  
 29. *Summons, how served.*  
 30. *Service of summons by publication, when defendant cannot be found, &c.*  
 31. *Order of publication, what to contain.*  
 32. *Action against two or more defendants, how plaintiff may proceed.*  
 33. *Proof of service, how made.*  
 34. *Certificate or affidavit of service, what to state.*  
 35. *Jurisdiction, when Court shall have acquired.*

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\* STATUTES OF 1854, 194; WOOD'S DIGEST, 249, ART. 1377.

*An Act prescribing the manner of commencing and maintaining suits by or against counties. Passed May 11th, 1854.*

1. Suits against a county may be commenced in any Court of that county, or in a District Court of the Judicial District in which such county is situated, in the same manner as suits against private persons; *provided*, that suits between counties shall be commenced in a Court of competent jurisdiction, in any county not a party to such action.
2. In counties where there is a Board of Supervisors, having an acting Chairman or President of such Board, the original process and papers shall be served on such Chairman or President, in the same manner as upon private persons; when there is no such Chairman or President, they shall in like manner be served on the County Judge of the county.
3. Immediately on the service of such process, it shall be the duty of the officer so served to deliver such process, and all papers accompanying the same, to the District Attorney for such county, whose duty it shall be to defend such cause or proceeding on the part of such county until final judgment or compromise of such suit or proceeding.
4. Suits brought for or against a county shall be by or in the name of such county.

STATUTES OF 1855, 56, § 24; WOOD'S DIGEST, 696, ART. 3333.

24. No person shall sue a county in any case, or for any demand, unless he or she shall first pre-ent his or her claim or demand to the Board of Supervisors for allowance; and if they fail or refuse to allow the same, or some part thereof, the party feeling aggrieved may sue the county; and if the party suing recover in the action more than said Board allowed, or offered to allow, said Board shall allow the amount of the said judgment and costs as a just claim against the county; but if the party suing shall not recover more than the Board shall have offered to allow him or her, then costs shall be recovered against him or her by the county. All claims for services, and items of account of a similar nature, presented by any one person to the Board of Supervisors, at any session of the Board, shall be included in one account, and so considered by the Board, unless by consent of the Board.

a. These statutes sustained. *Price v. Sacramento County*, 6 Cal. 255; *Gilman v. Contra Costa County*, Id. 676; 8 Id. 52; *County of Yuba v. Adams*, 7 Id. 35; *McCann v. Sierra County*, Id. 121; *Placer County v. Astin*, 8 Id. 303.

§ 22. *Actions, how commenced.*

[1855.] Civil actions in the District Courts and the County Courts shall be commenced by the filing of a complaint with the Clerk of the Court in which the action is brought, and the issuing of a summons thereon; *provided*, that, after the filing of the complaint, a defendant in the action may appear, answer or demur, whether the summons has been issued or not, and such appearance, answer or demurrer shall be deemed a waiver of summons.

N. Y. Code, § 127.

1. An appearance by attorney, at common law, and by the express letter of our statute, amounts to an acknowledgment or waiver of service. *Suydam v. Pitcher*, 4 Cal. 280.

2. Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the twenty-sixth of January, 1857, and summons issued thereon: *Held*, that the suit was not commenced until the issuing of the summons. *Green v. Jackson*, 10 Cal. 374.

3. The provision in the General Limitation Act of 1850, that the filing of the complaint shall be deemed a commencement of suit, applies to that act only, and not to the Mechanics' Lien Act. Under this latter act, to commence a suit within six months from the expiration of a credit given, a complaint must be filed and a summons issued. *Flandreau v. White*, 18 Cal. 639.

§ 23. *Complaint, how indorsed; when summons may issue, how signed and issued.*

[1860.] The Clerk shall indorse on the complaint the day, month and year the same is filed; and at any time within one year after the filing of the same the plaintiff may have a summons issued. The summons shall be signed by the Clerk, and directed to the defendant, and be issued under the seal of the Court.

1. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the Sheriff of the service of the summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. The remedy is by application to the District Court to quash the execution. (See authorities cited by appellant.) *Logan v. Hillegass*, 16 Cal. 200.

§ 24. *Summons, requisites of.*

[1854, 1859.] The summons shall state the parties to the action, the Court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of the summons, exclusive of the day of service, or that judgment by default will

be taken against him, according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint; and the Clerk shall also indorse on the summons the names of the plaintiff's attorneys.

1. The only object of a summons is to bring a party into Court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith v. Curtis*, 7 Cal. 587.

2. If the summons be radically defective, it will not support a judgment by default. *People v. Woodleif*, 2 Cal. 241.

3. In this case, the summons was returnable in thirty instead of forty days, and did not state that judgment by default would be taken unless the defendant appeared and answered, nor specify any amount for which judgment would be taken. *Id.*

4. In actions for fraud, the summons must apprise the defendant that on failure to answer, judgment will be taken against him for the fraud. A mere notice in the summons that a money judgment will be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

5. The Court may allow the summons to be amended by inserting a notice to the defendant of the nature of the demand, and that unless he appear and answer within the time therein specified, judgment by default will be taken against him. *Pollock v. Hunt*, 2 Cal. 194.

#### § 25. *Summons, time to answer.*

The time in which the summons shall require the defendant to answer the complaint, shall be as follows:

1st. If the defendant is served within the county in which the action is brought, ten days.

2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.

3d. In all other cases, forty days.

1. An answer filed without leave of Court after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity. *Bowers v. Dickerson*, 18 Cal. 420.

2. The Court in its discretion may strike out an answer so filed, or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer struck out. For these purposes, defendant is not in default until his default has been actually entered in accordance with the statute. *Id.*

3. A judgment by default before the expiration of the full time will be reversed on appeal. *Burt v. Scranton*, 1 Cal. 416.

4. Courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own Government, and of the local divisions of the country into States, counties, cities, towns, &c. *People v. Smith*, 1 Cal. 9; see note to § 24.

#### § 26. *Summons, what notice to be inserted therein.*

There shall also be inserted in the summons a notice, in substance as follows:

1st. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2d. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded therein.

See *ante*, § 24; N. Y. Code, § 129.

1. Where judgment by default is entered, in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud. A mere notice in the summons that a money judgment would be taken, will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 619.

### § 27. *Lis pendens*, filing and effect of.

[1862.] In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the Recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties to, and the object of, the action, and a description of the property in that county affected thereby; and the defendants may also, in such notice, state the nature and extent of the relief claimed in the answer. From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

N. Y. Code, § 132.

1. A *bona fide* purchaser of land without notice of proceedings pending for its condemnation, at the time of purchase, no notice of *lis pendens* being filed, is not affected by the proceedings. *Bensley v. Mountain Lake Water Company*, 13 Cal. 306.

2. Under our statute, the mere pendency of a suit does not charge the purchaser of the subject matter of the suit as a purchaser *pendente lite* at common law. A notice of *lis pendens* must be filed or appear of record. *Head v. Fordyce*, 17 Cal. 149.

3. Where notice of *lis pendens* was not filed, plaintiff cannot successfully set up that notice would have done no good to the purchaser, because he could make no defense, or no better defense than the vendor. The object of the notice is to give the opportunity of defense, and also to notify third persons of the litigation. *Richardson v. White*, 18 Cal. 102.

4. Our statute does not give any new rights to the plaintiff, but limits rights which he had before. It simply adds to the common law rule a single term, to wit: to require for constructive notice, not only a suit, but filing notice for it; and there is no distinction, under the statute, between different kinds of interest in or title to real estate. *Id.*

Query: Whether actual notice of *lis pendens* would be equivalent to notice filed with the Recorder. *Id.*

5. Our statute (Prac. Act, sec. 27) changes the common law rule upon this subject. *Id.*

6. A purchaser of real property, pending suit affecting the title to it, is not bound by the judgment, unless notice of *lis pendens* be filed with the County Recorder before the purchase. *Id.*

7. The only way to charge a purchaser of property, pending a suit, with con-

structive notice of the suit, is by filing a notice of *lis pendens* according to the statute. *Ault v. Gassaway*, 18 Cal. 205.

8. The effect of *lis pendens* is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment rendered, or which may be rendered in the suit in the pendency in which notice is given. *Gregory v. Haynes*, 13 Cal. 594; *Curtis v. Sutter*, 15 Cal. 263.

9. A *lis pendens* may be filed in an equity suit with like effect as in a suit at law. *Sparks v. Hess*, 15 Cal. 193.

### § 28. *Summons, by whom served.*

[1854, 1855, 1859, 1860.] The summons shall be served by the Sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a Judge of the Court in which the action is brought, or by any white male citizen of the United States, over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided; a copy of the complaint, certified by the Clerk, shall be served with the summons. When the summons is served by the Sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service, and of the service of the copy of the complaint, to the office of the Clerk from which the summons issued. When the summons is served by any other person as before provided, it shall be returned to the office of the Clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants.

1. The affidavit of service required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a *certified* copy of the complaint accompanied the summons. *McMillan and Wife v. Reynolds*, 11 Cal. 378.

2. Courts will take judicial notice of the signature of their officers, as such, but not of parties to a cause. *Alderson v. Bell*, 9 Cal. 321.

3. Courts should presume that the Sheriff served all process within his jurisdiction, where no place of service is stated. *Crane v. Brannan*, 3 Cal. 195.

4. His return is not traversable, nor can it be attacked collaterally, even if he has been guilty of fraud or collusion. *Eguy v. Buchanan*, 5 Cal. 56.

5. All returns must be made by the deputy in the name and by the authority of the Sheriff. *Joyce v. Joyce*, 5 Cal. 449.

6. Where he states that he served defendant with a certified copy of the complaint, it will be presumed that the copy was certified by the Clerk and not by some one else. *Curtis v. Herrick*, 14 Cal. 119.

7. A mistake in the date of the return may be corrected at any time. *Ritter v. Scannell*, 11 Cal. 248.

8. The Sheriff has no right to amend his return so as to affect vested rights. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 26.

9. The word "appurtenances" insufficient to comprehend within its meaning any personal property as the subject of a levy. *Monroe v. Thomas*, 5 Cal. 471.

10. A description in a Sheriff's return of city lots, by numbers, referring to the official map, is sufficient. *Welch v. Sullivan*, 8 Cal. 186.

11. Where the levy is made by posting a copy of the writ on the premises, it is not necessary to show by the return that the premises were at the time unoccupied. *Rutter v. Scannell*, 11 Cal. 248.

### § 29. *Summons, how served.*

[1854, 1861.] The summons shall be served by delivering a copy thereof, as follows:

1st. If the suit be against a corporation, to the President or other head of the corporation, Secretary, Cashier or Managing Agent thereof.

2d. If the suit be against a foreign corporation, or a non-resident joint stock company or association, doing business within this State, to an Agent, Cashier or Secretary thereof.

3d. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian; or if there be none within the State, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4th. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian.

5th. In all other cases, to the defendant personally.

Counties, how served, see ante, note \* to § 22, § 2 of the note.

1. **Corporations, service on.**—A Sheriff's return on the summons against a corporation, that he served the same on the President and Secretary of the company, is *prima facie* evidence that the persons named in the return were such officers. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

2. The return of a Sheriff on a summons, that he served it on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate. *Wilson v. Spring Hill Quartz Mining Co.*, 10 Cal. 445.

3. In a suit against a corporation, the summons must be served on one of the officers or agents named in the Practice Act. *Aikens v. Quartz Rock Co.*, 6 Cal. 186.

4. Service on a party in possession of the property, who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. *Id.*

5. Where, in an action against an incorporated company, the return of the Sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" *Held*, that it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was President, or head of the corporation, or Secretary, Cashier or Managing Agent thereof. *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

6. Where the summons was issued against Adams & Co., and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co.: *Held*, that judgment by default could not be sustained. *Adams v. Town*, 3 Cal. 247.

7. **Minor.**—The requirement of the statute being positive, that in actions



against a minor under the age of fourteen years, personal service of summons must be made; in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Gray v. Palmer*, 9 Cal. 616.

8. Service of the summons upon infants, although under the age of fourteen years, should be made by depositing a summons and certified copy of the complaint in the post office directed to the infant, the same as to other defendants. *Id.*

9. Under the Practice Act, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statutes, the mode would be by showing the original under seal of the Court, and delivering a copy. *Edmondson v. Mason*, 16 Cal. 386.

10. Service of a summons upon a party by a wrong name does not give the Court jurisdiction over his person; his appearance cannot be compelled, and by nonappearance he does not waive any of his rights. *Farnham v. Hildreth*, 32 Barb. 277.

11. In an action against Jacob V., the summons was, by mistake, served on James L. V., the father of the defendant, and who lived in the same house with him; soon after, the summons was, by members of the family, delivered to the defendant, who took no notice of it: *Held*, that his motion to vacate a judgment, entered on failure to answer, should be granted, without reference to the question whether he had any defense on the merits. No Court, whether of superior or inferior jurisdiction, can render a valid judgment without acquiring jurisdiction in some mode prescribed by law; the want of such jurisdiction, when ascertained, renders the judgment void. *Bloom v. Burdick*, 1 Hill, 130; *Goggs v. Lord Huntinglawer*, 12 Mees. & W. 502, overruling anonymous, 4 How. Pr. R. 112; *Williams v. Van Falkenburg*, 16 How. Pr. R. 144; 8 Abbott's Pr. R. 568.

§ 30. *Service of summons by publication when defendant cannot be found, etc.*

When the person on whom the service is to be made, resides out of the State, or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the Court, or a Judge thereof, or a County Judge, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by the publication of the summons.

N. Y. Code, § 135.

1. An affidavit for an order of the publication of the summons, upon the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the State, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the Court jurisdiction of the person of the defendant. *Swain v. Chase*, 12 Cal. 283.

2. Where the attorney of record makes an affidavit that diligent search has been made for the defendant, and that he conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication. *Anderson v. Parker*, 6 Cal. 201.

3. An affidavit, made to obtain an order for service of summons by publication, is insufficient to sustain an order which directs publication merely, without direct-

ing service by mail, unless such affidavit shows the fact of plaintiff's inability to discover the place of residence of the defendant sought to be served. *Cook v. Farmer*, 11 Abbott's Pr. 40.

§ 31. *Order of publication, what to contain.*

The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; provided, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. In case of publication, where the residence of a nonresident or absent defendant is known, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the nonresident, absent or concealed defendant, and conduct the proceedings on his part.

N. Y. Code, § 135.

1. The provision of the Practice Act authorizing judgment, personal and final, against an absent defendant for whom the Court has appointed an attorney, with privilege to the defendant to come in and deny in six months, is not in violation of the Constitution of the United States, or that of this State. *Ware v. Robinson*, 9 Cal. 107.

2. The Court may appoint an attorney for an alleged concealed defendant, and a judgment against him will stand after six months have elapsed, unless he filed his bill to set aside the judgment on the ground of fraud, that he was not concealed. *Id.*

3. The failure to deposit in the post office a copy of the complaint and summons, directed to a minor, is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 Cal. 616.

4. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. *Jordan v. Giblin*, 12 Cal. 100.

5. The Practice Act further provides, in relation to service on nonresidents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication:" *Held*, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer. *Grewell v. Henderson*, 5 Cal. 465.

6. A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant. *Jordan v. Giblin*, 12 Cal. 100.

7. Where legal notice is required to be published for ten weeks before a proceeding thereon could be had, a publication, though in each of ten successive weeks, is not sufficient, if the time between the first publication and the proceeding taken is less than seventy days. *The People, ex rel. Demarest, v. Gray*, 10 Abbott's Pr. 468.

8. An affidavit which avers a cause of action against the defendant; that defendant cannot after due diligence be found in the State; that summons has been issued, but Sheriff cannot find him: that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county—is insufficient to authorize the Court to appoint an attorney to represent such absent defendant. *Jordan v. Giblin*, 12 Cal. 100.

9. Where an order for service of summons upon a nonresident, by publication, is obtained, if personal service out of the State is effected, it is unnecessary to proceed to make publication and to deposit summons in the post office. A personal service takes the place of those steps. *Abrahams v. Mitchell*, Abbott's Pr. 123.

10. Where publication and mailing is ordered, personal service out of the State is only equivalent to mailing, and can have no greater effect. *Fiske v. Anderson*, Abbott's Pr. 8.

11. An order for service by publication, granted on the eighteenth, directed the summons to be mailed forthwith: *Held*, that a delay in mailing till the twenty-second, caused by waiting to have the papers printed, did not render the service irregular. *Van Wyck v. Hardy*, Abbott's Pr. 473. *Fifteen days delay would make it irregular. Back v. Cruswell*, 2 Al. 386.

12. An order for the publication of a summons, granted under subdivision two of section one hundred and thirty-five of the Code, which presupposes that the debtor is a resident of the State, but has departed therefrom, or keeps himself concealed therein, must direct a copy of the summons and complaint to be deposited in the post office, directed to the defendant at his place of residence, though it appear from the affidavit that he has departed therefrom. *Jowsley v. McDonald*, 32 Barb. 604.

### § 32. *Action against two or more defendants.*

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendants served, unless the Court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served.

2d. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

N. Y. Code, 136.

1. When the record shows, in general terms, the appearance of parties, the appearance will be confined to those parties served with process. *Chester v. Miller*, 13 Cal. 558.

2. C. purchased goods on his individual account, and directed plaintiff to charge the same to the joint account of C. and J., without authority from J. In an action by plaintiff: *Held*, that, although J. was not liable, judgment might be rendered against C. The common law rule is modified so far, at least, as to permit judgment against a portion of the defendants, whenever the contract purports on its face to be the contract of all the parties sued, and it turns out in proof that a por-

sion only are liable. *Lewis v. Clarkin*, 18 Cal. 399; *Stearns v. Aguirre* (6 Cal. 176) in this respect overruled. *Id.*

3. The provisions of the thirty-second section of the Practice Act, which, in an action against two or more defendants, all of whom are not served, authorizes judgment to be entered to bind the joint property of all the defendants, does not apply to actions for the foreclosure of mortgages on real estate. *Bowen v. May*, 12 Cal. 348.

### § 33. *Proof of service, how made.*

Proof of the service of the summons shall be as follows :

1st. If served by the Sheriff or his deputy, the affidavit or certificate of such Sheriff or deputy.

2d. If by any other person, his affidavit thereof.

3d. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same ; and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited.

4th. The written admission of the defendant.

N. Y. Code, § 138.

1. **Return by the Sheriff.**—Where, in an action against an incorporated company, the return of the Sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" *Held*, that it was not sufficient evidence of service to give the Court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

2. Where the return of a Sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the Clerk, and not by some one else. *Curtis v. Herrick*, 14 Cal. 117.

3. Courts cannot know an under officer, and the act and return on a summons of a deputy Sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

4. **Return by any other person.**—The affidavit of service required by this section must show that the person serving it was a white male citizen, over twenty-one years of age, competent to testify in the cause, and that a *certified* copy of the complaint accompanied the summons. *McMillan v. Reynolds*, 11 Cal. 378.

5. See *ante*, § 28.

6. **Return in case of publication.**—The failure to deposit in the post-office a copy of the complaint and summons, directed to such minor, is not cured by the appearance of the mother in her own behalf. *Gray v. Palmer*, 9 Cal. 616.

7. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper, is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk. *Id.*

8. **Written admission of defendant.**—Courts will take judicial notice of the signatures of their officers, as such ; but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence, the Court cannot notice them. *Alderson v. Bell and Wife*, 9 Cal. 315.

9. An acknowledgment of service of summons is only sufficient when reduced

to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery v. Tutt*, 11 Cal. 307.

10. The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. *Alderson v. Bell and Wife*, 9 Cal. 315.

11. Where defendant's attorneys accepted service of the summons, but attached no date thereto, the date of the return by the Sheriff was held to be the true date of the service. When the place where the writ is served is not stated, the Court should assume that it was served within the jurisdiction of the officer to whom it is directed. *Crane v. Brannan*, 3 Cal. 194.

### § 34. Certificate or affidavit of service, requisites of.

In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.

N. Y. Code, § 138.

1. The only object of the designation of the place where process is served, is to determine the period within which the answer must be filed, or when default may be taken. *Whitwell v. Barbier*, 7 Cal. 62.

2. Where the evidence of the place of service is insufficient to authorize a judgment, advantage of it should be taken, either by appeal or on motion to vacate the judgment. *Pico v. Sumol*, 6 Cal. 294.

### § 35. Jurisdiction, when Court shall have acquired.

From the time of the service of the summons and copy of complaint in a civil action, the Court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.

N. Y. Code, § 139. As to what constitutes an appearance, see *post*, § 523.

1. In order to give a Court jurisdiction of the subject matter, so as to enable it to issue orders or process, there must be a suit instituted in the Court. *Ex parte Cohen*, 6 Cal. 318.

2. The first point decided by any Court is, that the Court has jurisdiction, although it may not be in terms. *Clary v. Hoagland*, 6 Cal. 685.

3. The object of a summons is to bring the party into Court. If that object be attained by the appearance and pleadings of the party, he cannot complain. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

4. Where a defendant was served with process, but was not given the time allowed by statute to appear and answer, it would be a sufficient reason for the Court to quash the writ on motion by an *amicus curiæ*, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment or motion for a new trial; but it cannot be said that the Court had no jurisdiction of the person, so as to render its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 62.

5. In actions *in personam* in Courts other than Admiralty Courts, no man can be deprived of his property without having been first personally cited to appear and make his defense, unless by virtue of some positive statutory enactment. *Loring v. Illsley*, 1 Cal. 29.

6. Service of summons upon a party by a wrong name does not give the Court jurisdiction over his person. His appearance cannot be compelled, and by non-appearance he does not waive any of his rights. *Farnham v. Hildreth*, 32 Barb. 277; 12 Abbott's Pr. R. 582.

## TITLE IV.

## OF THE PLEADINGS IN CIVIL ACTIONS.

- SEC. 36. *Form of pleadings.*  
37. *Sufficiency of pleadings, how determined.*  
38. *Pleadings on the part of plaintiff and defendant.*  
39. *Complaint, what to contain.*  
40. *When defendant may demur.*  
41. *Demurrer must specify grounds of objection.*  
42. *Demurrer and answer.*  
43. *Amended complaint, how filed and served.*  
44. *Objection not appearing on complaint.*  
45. *Objection, when deemed waived.*  
46. *Answer, what to contain.*  
47. *Counter claim.*  
48. *Cross demands.*  
49. *Several defenses.*  
50. *Demurrer to answer and sham and irrelevant defenses.*  
51. *Pleadings to be verified.*  
52. *Pleadings, when not to be verified.*  
53. *Copy of instrument, when deemed admitted as genuine.*  
54. *When deemed not admitted.*  
55. *Pleadings, how and by whom verified.*  
56. *Items of account. Bill of particulars.*  
57. *Irrelevant or redundant matter.*  
58. *In real actions, how to describe property.*  
59. *Judgments, how to be pleaded.*  
60. *Conditions precedent, how to be pleaded.*  
61. *Private statutes, how to be pleaded.*  
62. *Libel and slander, how stated in the complaint.*  
63. *Answer in such cases.*  
64. *What causes of action may be joined.*  
65. *Allegation not denied, when to be deemed true.*  
66. *What is a material allegation.*  
67. *Amendments of course, and effect of demurrers.*  
68. *Who may enlarge time to plead, correct mistakes, amend and relieve from judgment in certain cases.*

69. *Fictitious name.*  
70. *Pleadings, how constructed.*  
71. *No error or defect to be regarded, unless it affects the substantial rights.*

The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court.

§ 37. *Sufficiency of pleadings, how determined.*

All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act.

Section 83. The pleadings on the part of the plaintiff shall be the complaint or demurrer to the defendant's answer, and the pleadings on the part of the defendant to the original complaint or demurrer shall be the answer of a co-defendant shall be the answer or answer. When a defendant is entitled to relief as against the plaintiff alone, or against the plaintiff and co-defendant, he may make a separate statement in his answer of the necessary facts, with a prayer for the relief sought, instead of bringing a distinct cross action. All pleadings subsequent to the original complaint shall be filed with the Clerk, and a copy thereof served on the adverse party or his attorney, if the adverse party or his attorney live within the county where the action is pending; provided, that when the answer contains a cross complaint the parties, plaintiff or defendant, or his or their attorney thereto, shall be served with a copy thereof, and shall have the same time thereafter to plead thereto that is allowed for pleading to the original complaint after service of the summons.

*plaintiff and defendant.*

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§ 39. *Complaint, what to contain.*

**The complaint shall contain:**

- 1st. The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant.
- 2d. A statement of the facts constituting the cause of action, in ordinary and concise language.
- 3d. A demand of the relief which plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated.

N. Y. Code, § 142. As to the subject of parties, see *ante*, §§ 1-17.

- 1. Statement of the facts constituting a cause of action.**

## GENERAL RULES.

2. The statute requiring the complaint to contain a statement of the facts constituting a cause of action, in ordinary and concise language, is only declaratory of the common law. *Godwin v. Stebbins*, 2 Cal. 103.

3. The Practice Act has abolished all distinctions in the form of actions, and requires only a simple statement of the facts constituting the cause of action or defense. *Piercy v. Sabin*, 10 Cal. 27.

4. It governs all cases of pleading, legal and equitable, by the same rules—evidence included. *Goodwin v. Hammond*, 13 Cal. 169; *Biddle v. Baker*, Id. 382; *Payne v. Treadwell*, 16 Id. 243.

5. It makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

6. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural. *Douglas v. Pacific M. S. S. Co.*, 4 Cal. 413.

10. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is, in itself, indifferent. *Payne v. Treadwell*, 16 Cal. 220.

17. Every fact which, if controverted, plaintiff must prove to maintain his action must be stated in the complaint. *Jerome v. Stebbins*, 14 Cal. 457.

18. It was the intention of the Code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them respectively, but to narrow the proofs on the trial. *Piercy v. Sabin*, 10 Cal. 22.

19. He must allege nothing affirmatively which he is not required to prove. *Green v. Palmer*, 15 Cal. 413. It must be recollected that every fact essential to the claim of defense should be stated. If this part of the rule be violated, the adverse party may demur. *Id.*

20. Nothing should be stated which is not essential to the claim or defense, or in other words, that none but issuable facts should be stated. If this part of the rule be isolated, the adverse party may move to strike out the unessential parts. *Id.*

21. **Material averment, test of.**—An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient; and, of course, need not be proved or disproved. *Id.*; *Whitwell v. Thomas*, 9 Cal. 499.

22. The following question will determine, in every case, whether an allegation



69. *Fictitious name.*

70. *Pleadings, how constructed.*

71. *No error or defect to be regarded, unless it affects the substantial rights.*

### § 36. *Form of pleadings.*

The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court.

For intervention, see § 659, etc.

### § 37. *Sufficiency of pleadings, how determined.*

*Amendment to Sec. 38.—Passed April 25th, 1863.*

[Takes effect sixty days after passage.]

§ 38. The only pleadings on the part of the plaintiff shall be the complaint or demurrer to defendant's answer, and the only pleadings on the part of the defendant shall be the demurrer or the answer. The demurrer or answer of the defendant and the demurrer of the plaintiff shall be filed with the Clerk, and a copy thereof served on the adverse party or his Attorney; *provided*, the adverse party or his Attorney live within the county where the action is pending.

[Final complaint after service of the summons.]

### § 39. *Complaint, what to contain.*

The complaint shall contain:

1st. The title of the action, specifying the name of the court and the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant.

2d. A statement of the facts constituting the cause of action, in ordinary and concise language.

3d. A demand of the relief which plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated.

N. Y. Code, § 142. As to the subject of parties, see *ante*, §§ 1-17.

1. Statement of the facts constituting a cause of action.

### GENERAL RULES.

2. The statute requiring the complaint to contain a statement of the facts constituting a cause of action, in ordinary and concise language, is only declaratory of the common law. *Godwin v. Stebbins*, 2 Cal. 103.

3. The Practice Act has abolished all distinctions in the form of actions, and requires only a simple statement of the facts constituting the cause of action or defense. *Piercy v. Sabin*, 10 Cal. 27.

4. It governs all cases of pleading, legal and equitable, by the same rules—evidence included. *Goodwin v. Hammond*, 13 Cal. 169; *Biddle v. Baker*, Id. 382; *Payne v. Treadwell*, 16 Id. 243.

5. It makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

6. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural. *Douglas v. Pacific M. S. S. Co.*, 4 Cal. 304.

7. The object of sworn pleadings is to elicit the truth, and this object must be entirely defeated, if the same fact may be denied and admitted in the same pleading. *Hensley v. Tartar*, 14 Cal. 509; *Blankman v. Vallejo*, 15 Id. 644.

8. **Venue.**—So, when the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the statute must be carried out. It is the business of the plaintiff to show in his complaint, that he comes within the exception. *Uhfelder v. Levy*, 9 Cal. 607.

9. **Facts alone must be stated.**—Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis and from the evidence of the facts. *Green v. Palmer*, 15 Cal. 413.

10. A legal inference or conclusion from the facts should not be stated. *Id.*

11. Argument in a pleading is equally inappropriate. *Id.*

12. Hypothetical statements are improper. *Id.*

13. The defendant's pretenses are equally improper. The facts must be carefully distinguished from the evidence of the facts. *Id.*

14. **Alternative or disjunctive allegations.**—Under no system of pleading will alternative or disjunctive allegations be permitted. *Porter v. Hermann*, 8 Cal. 624.

15. **Facts to be proved, to be stated.**—Those facts, and those only, must be stated which constitute the cause of action, the defense or the reply; therefore, each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. *Green v. Palmer*, 15 Cal. 413.

16. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is, in itself, indifferent. *Payne v. Treadwell*, 16 Cal. 220.

17. Every fact which, if controverted, plaintiff must prove to maintain his action must be stated in the complaint. *Jerome v. Stebbins*, 14 Cal. 457.

18. It was the intention of the Code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them respectively, but to narrow the proofs on the trial. *Piercy v. Sabin*, 10 Cal. 22.

19. He must allege nothing affirmatively which he is not required to prove. *Green v. Palmer*, 15 Cal. 413. It must be recollected that every fact essential to the claim of defense should be stated. If this part of the rule be violated, the adverse party may demur. *Id.*

20. Nothing should be stated which is not essential to the claim or defense, or in other words, that none but issuable facts should be stated. If this part of the rule be isolated, the adverse party may move to strike out the unessential parts. *Id.*

21. **Material averment, test of.**—An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient; and, of course, need not be proved or disproved. *Id.*; *Whitwell v. Thomas*, 9 Cal. 499.

22. The following question will determine, in every case, whether an allegation

be material: "Can it be made the subject of a material issue?" In other words: "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. It is not one of those which constitute the causes of action, defense or reply. *Green v. Palmer*, 15 Cal. 413.

23. A pleader must insert in his pleading: first, whatever he is to prove; second, he must insert no affirmative allegation which he is not to prove; and third, that what he does insert must be decisive of some part of the cause one way or the other. *Id.*

24. All statements must be concisely made, and when once made, must not be repeated. *Id.*

25. An occurrence should be set forth in its logical, that is, in its natural order. *Id.*

26. **Statutory privilege must be alleged.**—When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts. *Dye v. Dye*, 11 Cal. 167.

27. **Matters in avoidance.**—Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. *Gaskill v. Trainer*, 4 Cal. 235.

28. **Fiction in pleading repudiated.**—Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still, facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. *Payne v. Treadwell*, 5 Cal. 311.

29. The system of practice in this State repudiates all fictions. *Payne v. Treadwell*, 16 Cal. 243.

30. **Formal allegations.**—Allegations merely formal, *i. e.*, such as require no proof at the trial, are unnecessary under the Code. *Ensign v. Sherman*, 14 How. Pr. R. 439. At least, whether their absence is ground of demurrer or not, it is not ground for interfering with a verdict. *Dias v. Short*, 16 How. Pr. R. 322.

31. **Negative allegations.**—Negative allegations, however, are frequently necessary, though they are not to be proved. *Green v. Palmer*, 15 Cal. 411.

32. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is in itself indifferent. *Payne v. Treadwell*, 16 Cal. 220.

33. **Account.**—The complaint in this case, alleging that plaintiff and defendants are members of a joint stock company, known as the "Miner's Ditch Company;" that defendants exclude plaintiff from participation in the business or benefit from it; that they have received large sums of money from the same, and refuse to account or pay him anything, etc., entitles plaintiff to relief by a decree affirming his interest, and directing an account. *Smith v. Fagan*, 17 Cal. 178.

34. In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial. *Bushnell v. McCauley*, 7 Cal. 421.

35. An averment that one party made a statement of an account and delivered it to the other, who made no objection to it, is not an averment that an account was stated between them. *Emery v. Pease*, 20 N. Y. (6 Smith) 32; *Lockwood v. Thorn*, 18 Id. 285.

36. **Arrest.**—To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

37. When the circumstances authorizing an arrest occur subsequently to the filing of the complaint, application should be made to the Court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the enforcement of the judgment sought. *Id.*

38. An affidavit, in pursuance of which a warrant is issued, is defective, which contains allegations upon information and belief merely; and if it states no fact

within the knowledge of the affiant, it can be of little weight in any legal proceeding. *People v. Smith*, 1 Cal. 11.

39. In an action to recover money secured by a person as agent, he cannot be arrested without the affidavit showing some fraudulent conduct on his part, or a demand on him for the money, and a refusal to pay. *Ex parte Holdforth*, 1 Cal. 440.

40. A complaint alleging that the defendant collected and received certain money as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud, and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

41. **Assignees.**—Where a party sets up in his pleadings an assignment to him of a contract made with another, he must allege a positive transfer, and the character of it. *Stearns v. Martin*, 4 Cal. 227.

### ASSUMPSIT.

42. **Tort, when may be waived.**—When personal property is tortiously taken, the party aggrieved may waive the tort, and sue in assumpsit for the value of the property. *Fratt v. Clark*, 12 Cal. 89.

43. Where the breach of a contract is a wrong, the party may sue in tort, instead of suing upon the contract. *Sheldon v. Steamer Uncle Sam*, 18 Cal. 526.

44. A plaintiff has a right to waive a tort, as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales. *Lubert v. Chauviteau*, 3 Cal. 458.

45. **Common counts.**—The common counts cannot be united in one count as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 146.

46. **Money had and received.**—A count in a complaint for money had and received, which does not allege a demand, is demurrable. *Reina v. Cross*, 6 Cal. 29.

47. An action for money had and received to the use of plaintiff lies, whenever the defendant has in his hands money of plaintiff's which in equity and conscience he has no right to retain; and this, whether there be or not any contract or privity between the parties. *Kreutz v. Livingston*, 15 Cal. 344.

48. A complaint for money received, which states that at a specified time the defendants received, as agents of the plaintiffs, from a specified party certain sums of money, amounting in the aggregate to a specified sum, and states a demand and refusal to pay, is not obnoxious to motion to make more definite and certain. The defendant, if he wishes more, must seek a bill of particulars. *Sloman v. Schmidt*, ante, 5.

49. **Money loaned.**—The declaration was for money loaned, and set out a draft drawn by defendants on a house in Boston, which it avers was drawn with the understanding that plaintiff should pay the same, but did not aver that after paying the draft, he canceled it, and delivered it up to the defendant: *Held*, that the defects were fatal in this form of action. *Lambert v. Slade*, 3 Cal. 380.

50. **Money paid, laid out and expended.**—A complaint, stating that whereas said defendant was justly indebted to plaintiffs in the sum of three thousand dollars, for money paid, laid out and expended for the use and benefit of said defendant, and at his special instance and request, to wit: at, etc., and on the first day of April, 1857, and in the sum of three thousand dollars, for money found to be due from the defendant to plaintiffs on an account then stated between them, and the said defendant being so indebted to the plaintiffs, afterwards, to wit: on the day and year aforesaid, at the place aforesaid, undertook and faithfully promised the plaintiffs to pay the same, etc., and that said sum is due and unpaid, sufficiently states a cause of action. *De Witt v. Porter*, 13 Cal. 171.

51. **Goods sold and delivered.**—The failure to state the amounts due, severally, for goods and for money, would be fatal, just as such an averment is insufficient in an ordinary complaint. *Cordier v. Schloss*, 18 Cal. 576.

52. A count, in the ordinary form of counts in *indebitatus assumpsit*, for goods

sold and delivered, and money paid and expended, is sufficient, under our system of practice. If the allegations are deemed too general, the defendant can apply for and obtain an order upon the plaintiff to furnish a bill of particulars. *Freeborn v. Glazer*, 10 Cal. 337.

53. A declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant or that of another. *Merston v. Randall*, 4 Cal. 324.

54. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as the agents of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cockran v. Goodman*, 3 Cal. 244.

55. In an action for goods sold and delivered, and work done, where the only thing special about the contract is the stipulation as to price, the complaint is sufficient if it alleges generally that the defendant is justly indebted to the plaintiff in the sum of, etc., together with interest, on an account for, etc. The contract in such case need not be specially set forth. *Allen v. Patterson*, 3 Seld. 476; *Moffet v. Sackett*, 4 E. P. Smith's (18 N. Y.) R. 522.

56. The plaintiff sued to recover for services as agent of defendants, under an alleged agreement with defendant's agent, but there was no proof that the agent had authority to make the agreement: *Held*, that the plaintiff should have sued for work and labor done, and not upon the agreement. *Johnson v. Pacific M. S. S. Co.*, 5 Cal. 407.

57. A claim for services was stated as follows: That the plaintiffs, at the time hereinafter mentioned, and before and afterwards, were partners and stock brokers at, etc., and that they reasonably deserve to have from the defendant for their services as such stock brokers, in making purchases and sales of stock, which they were employed by the said defendant to make, and which they did make as his brokers, during the year 1854, a large sum of money, to wit, the sum of one hundred and fifteen dollars or thereabouts, and that the defendant has not paid the said commissions, nor any part thereof to the plaintiffs: *Held*, sufficient on demurrer, though it would be obnoxious to a motion to make more definite and certain. *Merwin v. Hamilton*, 6 Duer, 244.

58. A complaint which alleges that the defendant was employed as the plaintiff's agent for the purchase of stock, that on a settlement between the vendor and the defendant, the former was found to be indebted to the latter as the plaintiff's agent in a certain sum, which he paid, but which the defendant refuses to pay to the plaintiff—states a sufficient cause of action. It is not necessary to show how the vendor became indebted to the defendant. *Bates v. Cobb*, 5 Bosw. 29.

59. **On special contract.**—Where the plaintiff's pleadings admit that the work sued for was done under a special contract, which fixed the price, it is error to admit evidence of value as a basis of recovery beyond the contract. *Trimble v. Stilwell*, 4 Smith's C. P. 512.

60. Under a complaint on a special contract, the plaintiff failing in proof of the special contract, may recover on a *quantum meruit*. *Morgan v. Mason*, 4 Smith's C. P. 636.

61. The complaint was general for services and materials. The answer alleged that there was a special contract, and alleged generally that the plaintiffs had failed to fulfill the contract; and also set forth a number of instances of disregard of the terms of the contract, and sought to recover damages as a counter claim. The reply admitted the contract, but denied the breaches specified. *Held*, that the defendant was not confined to the particular defects stated, but might prove any defect under his general allegation. [*Grant v. Button*, 14 Johns. 377.] If this clause was too general, the defendant's remedy was by motion. *Trimble v. Stilwell*, 4 Smith's C. P. 512.

62. Under a complaint for services generally, the plaintiff cannot recover for services under a special contract, which has not been fully completed. If he would recover for such services, he must, as well under the Code as before, plead the contract and the partial performance. *Atkinson v. Collins*, 9 Abbott's Pr. 353.

63. In an action for breach of contract, an averment that the plaintiff was prevented from performing, or being ready to perform on his part, by the act of the

defendant, is a sufficient excuse, and dispenses with the necessity of an allegation of performance or readiness to perform. 3 Barb. 614-15; 7 Id. 170-71; *Fleming v. Gilbert*, 3 Johns. 528; *Moakley v. Riggs*, 19 Johns. 69; *Mayor of New York v. Butler*, 7 Barb. 337; *Franchet v. Leach*, 5 Cow. 506; *North v. Pepper*, 21 Wend. 636.

64. A complaint for breach of contract, which alleges a contract in which the defendant's covenant is independent and unconditional, and the only covenants on the plaintiff's part are dependent on defendant's performance, need not allege performance by plaintiff. *Pordage v. Cole*, 1 Saund. 320, a; *Grant v. Johnson*, 1 Seld. 247; *Tomkins v. Elliott*, 5 Wend. 496; *Smith v. Betts*, 16 How. Pr. R. 251.

65. On a promissory note or bill of exchange.—In this State the English rule is adopted, that where a place of payment is named in a bill of exchange or promissory note, it is a substantial contract, and it is necessary to allege and prove a demand at the place specified. *Milo v. Van Valkenburgh*, 7 Cal. 166.

66. In an action against the maker of a note, or the acceptor of a bill of exchange, in which the place of payment is fixed, it is not necessary to aver presentment at that place and refusal to pay. *Montgomery v. Tutt*, 11 Cal. 307.

67. A declaration is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone v. Laurencel*, 4 Cal. 277.

68. An indorser of a note payable on demand, no demand being made until thirteen months after the indorsement to plaintiff is, *prima facie*, not liable. The delay is unreasonable. In such case, facts to excuse the delay are an essential part of the complaint, and if not averred therein, it is insufficient. *Jerome v. Stebbins*, 14 Cal. 457.

69. In a complaint against an indorser, an allegation that the note was duly presented and payment demanded, but it was not paid, and due notice of non-payment was given, etc., is insufficient on demurrer. *Paquique Bank v. Martin*, 11 Abbott's Pr. 291.

70. In an action on notes payable in merchandise, the complaint, after describing them and averring that the defendants made them, alleged that they were duly indorsed to the plaintiff, that he was the lawful owner and holder of them, and that payment of them, before the commencement of the suit, was duly demanded, and that no part of them had been paid: *Held*, sufficient to sustain a recovery. These allegations having been put at issue, are sufficient to admit proof of an absolute sale and delivery of the notes to the plaintiff, and of a demand of payment of them, and of a refusal by the defendants to pay. *Prindle v. Caruthers*, 15 N. Y. R. 425; *Brown v. Richardson*, 1 Bosw. 402.

71. The complaint against the acceptor of a bill of exchange alleged the drawing of the bill, describing it, a delivery of it to the payee, "who then and there indorsed it, and delivered it so indorsed; and thereafter, and before maturity, the same came lawfully into the possession of these plaintiffs for value; that it was accepted, but the same is past due and wholly unpaid, and the defendant is now justly indebted to these plaintiffs thereon in the sum of," etc., without any allegation that plaintiffs were partners, or that they were owners and holders of the bill: *Held*, sufficient on demurrer. *Phelps v. Ferguson*, 9 Abbott's Pr. 206.

72. Form of a sufficient complaint on a promissory note in an action against a maker and a surety. *Osgood v. Whittlesey*, 10 Abbott's Pr. 134.

73. Where the complaint on a bill against drawees alleged that they had refused to accept, and that they had had a settlement of accounts with the drawers, and that on such settlement the drawers had left in the defendants' hands sufficient money to pay the bill, which the defendants then agreed to pay: *Held*, that the action must be sustained. 12 Johns. 276; 1 Id. 139; 13 Id. 496; 17 How. Pr. 289; *Miltenberger v. Atwood*, 18 How. Pr. 330.

74. A complaint on a note payable in merchandise set forth the note, and averred that it was duly indorsed to the plaintiff by the payee, and that the plaintiff was the lawful owner and holder thereof: *Held*, 1. That the complaint was defective in not alleging an assignment of the note. 2. That the title to such a note could not pass by indorsement. 3. That the averment of ownership, though argumentative, was sufficient on the trial to allow evidence of an assignment. 4. That the remedy against such defects is by motion only. *Brown v. Richardson*, 20 N. Y. (6 Smith) 472.

75. Whether, in case of a foreign bill drawn otherwise than upon England, it would not be necessary to set out the law of the place of payment respecting protest, in order to enable the Court to judge of the truth of an averment of demand and protest. *Query*, *Id.* 523, note.

76. An averment of protest does not imply a proper demand. *Id.*; *Price v. McLane*, *Id.* 544.

77. In a complaint by the payee of a promissory note against the maker, it is not necessary to allege that the plaintiff has not parted with the note, or that he is the holder. A complaint showing that the defendant made the note, payable to the plaintiff, and delivered it to him, and that it has not been paid, is sufficient on demurrer. *Niblo v. Harrison*, 7 Abbott's Pr. 447.

78. A complaint on a promissory note, showing that the plaintiff holds it as trustee, as a collateral security under a trust instrument which expressly authorizes him to sell it, but does not expressly authorize him to sue upon it, is bad on demurrer. *Nelson v. Eaton*, 7 Abbott's Pr. 307.

79. A complaint by the payee of a note to order, seeking to charge as indorser or as guarantor one who wrote his name upon the back of the note before its delivery to the payee, is bad on demurrer. *Waterbury v. Sinclair*, 7 Abbott's Pr. 398.

80. An action against one McClave, as the maker, and others, as indorsers, of a promissory note, the complaint set forth a copy of a note signed McClave & Co., upon which it alleged the defendants were indebted, etc. The word "signed" was prefixed to the names of the makers, and the word "indorsed" was prefixed to the names of the indorsers, in the copy; but there was no other allegation that the defendants made or indorsed the note, except that it was alleged that the note was "written," and that it was "passed" to the plaintiff: *Held*, on demurrer, that the making and indorsement should be deemed sufficiently alleged.—(*Griswold v. Laverty*, 12 N. Y. Leg. Obs. 316; *Bank of Geneva v. Gulick*, 8 How. Pr. R. 51)—yet that the complaint was bad, as showing a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the note was signed by McClave in the name of McClave & Co. The words "& Co." indicate a firm. The defendant may have been a member of that firm, and yet never have made the note, nor have had any knowledge of its existence. It may have been made by some other member of the firm, for his private purposes, and passed to the plaintiff under circumstances of notice, or otherwise, which would wholly relieve the defendants from all liability on the note. It will not do to call the words "& Co." a mere adjunct or surplusage. If the pleader relies on the copy of the note as sufficient, under section one hundred and sixty-two, then it shows the note to have been made by a partnership, and not by McClave individually. Some averment was, therefore, necessary to obviate this objection. It is not an answer to say it is an objection which should have been taken advantage of by a special demurrer. The objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of McClave. *Price v. McClave*, 6 Duor, 544.

81. **Nondelivery.**—Where a party contracts for a quantity of wheat, to be delivered on demand, and paid for on delivery, in an action for nondelivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit. *Crosby v. Watkins*, 12 Cal. 85.

82. A complaint, alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 209.

83. The true point at issue is, whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty. *Id.*

84. The complaint alleged a sale and delivery to the defendant, and the evidence showed a sale to the defendant, and a delivery to a third person by the defendant's direction, for the exclusive use of the defendant, and that the defendant ratified the same by promises to pay: *Held*, an immaterial variance, the defendant not appearing to have been misled. *Rogers v. Verona*, 1 Bosw. 417.

## VARIOUS CAUSES OF ACTION.

85. **Common carriers.**—In an action for negligence of defendant as a carrier, in losing plaintiff's trunk, it is not necessary for the plaintiff to aver in his complaint that the trunk was lost without his fault. It was enough that the plaintiff states the delivery to the defendant, and that the loss occurred through his negligence. *Richards v. Westcott*, 2 Bosw. 589.

86. The complaint in an action by the representatives of Y. against the representatives of W., as a common carrier of passengers, undertook, for a due consideration, to ferry Y. across the river, etc., in a skiff, alleged that he carelessly and negligently upset the skiff containing Y., whereby he was drowned, and drowned by the careless and negligent acts of the said W. and his servant. It further alleged the appointment of the plaintiff, his widow, as his administratrix, and that the pecuniary injuries resulting from the death of Y. to his wife and next of kin were at least \$5,000; and further showed the death of W., and the appointment of defendants as his executors: *Held*, on demurrer, sufficient. *Yertori v. Wiswall*, 16 How. Pr. R. 8.

87. **Cotenants.**—In an action by a tenant in common against his cotenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint of which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues and profits amount to \$84,000, is insufficient to support the action. *Pico v. Columbet*, 12 Cal. 414.

88. In such complaint, there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and, viewed in this light, the complaint is fatally defective, in not averring that the defendant occupied the premises upon any agreement with the plaintiff, as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and equally essential to the complaint that it be alleged. *Id.*

89. It follows that where an injury to joint property is alleged in the complaint, and it is averred that one of the joint owners has assigned his claim therefor to the other, who brings this action for damages in his own name alone, the complaint is demurrable. *Oliver v. Walsh*, 6 Cal. 456.

90. **Corporations, actions by.**—The allegation that plaintiff is a corporation under the laws of the State, is sufficient to establish the legal capacity to sue. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258.

91. Before the Court can take notice of the regulations of particular religious denominations, or their nature or effect, their existence should be properly averred and proved as matter of fact. *Youngs v. Ransom*, 31 Barb. 49.

92. It seems, that in an action by a corporation, it is necessary that the complaint specify, by date and title, the acts amending the act incorporating the plaintiffs. It is sufficient to designate that act particularly, and to refer generally to the other acts amendatory thereof. *Sun Mutual Ins. Co. v. Dwight*, 1 Hill, 50.

93. The plaintiffs sued as the President, Directors and Company of the Connecticut Bank, claiming to recover as indorsees of notes made by the plaintiffs, but did not aver that they were a corporation: *Held*, on demurrer, that the complaint was insufficient. *Connecticut Bank v. Smith*, 9 Abbott's Pr. 168.

94. The complaint of a foreign corporation must plead the fact of its incorporation, except in the case where the defendants are estopped from denying the incorporation, as by having contracted with the corporation by their corporate name. *Id.*

95. In an action by a domestic corporation, it is not necessary that the complaint should set forth the mode of plaintiff's incorporation, or recite the title and date of the act under which the plaintiff was incorporated. *Shoe and Leather Bank v. Brown*, 9 Abbott's Pr. 218.

96. In an action brought by a corporation, or its assignee, upon an agreement with the corporation, no specific allegation in the complaint of the incorporation of the company is necessary; a statement of the name of the corporation, and of the making of the agreement between the defendant and the company, and of what



the company did in fulfillment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is mere evidence in support of it, not essential to be particularly stated in the pleading. [*Norris v. Stops*, 110b. 211; *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1536; *President of U. S. Bank v. Haskins*, 1 Johns. 132; *Bennington Iron Co. v. Rutherford*, 3 Har.'s (N. J.) R. 105, 158; *Harris v. Muskingham Co.*, 4 Blackf. 267; *Richardson v. St. Jos. Iron Co.*, 5 Id. 146; *Dutchess Cotton Manufacturing Co. v. Davis*, 14 Johns. 239; *Bank of Utica v. Smalley*, 2 Cow. 770, 778; *Bank of Michigan v. Williams*, 5 Wend. 478, 482.] *Kennedy v. Colton*, 28 Barb. 59.

97. **Corporations, actions against.**—In suit against a municipal corporation on its bonds, the complaint sets out the bonds; avers the defendant to be a corporation; that the corporation made and delivered the bonds on good consideration, under an ordinance passed by the proper agents of the corporation, having authority for that purpose, and that defendant has failed to pay: *Held*, that the complaint shows *prima facie* a liability on the part of the corporation; and that it was not necessary to set out the ordinance, nor the vote, or other proceedings of the corporate agents, or give any further description of the agents of the corporation. *Underhill v. Trustees of the City of Sonora*, 17 Cal. 172.

98. The allegation that plaintiff is a corporation under the laws of the State, is sufficient to establish the legal capacity to sue. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258.

99. Form of a complaint in an action to charge trustees of a corporation with a debt of the corporation, on the ground of fraud. *Ogden v. Rollo*, 9 Abbott's Pr. 8, note.

100. Form of a complaint in an action to enforce the personal liability of a trustee for a debt of his corporation. *Andrews v. Murray*, 9 Abbott's Pr. 8.

101. In an action to charge the officers of a corporation with damages for making and publishing false representations as to the condition of the corporation, whereby plaintiff was induced to purchase stock, a general averment that they did so "with intent to deceive and defraud those who might become purchasers and owners of the stock:" *Held*, sufficient on demurrer. *Morse v. Wits*, 19 How. Pr. 275.

102. Substance of a complaint against stockholders on a judgment against the corporation. *Witherhead v. Allen*, 28 Barb. 661.

103. Where the duty of defendants was dependent upon certain facts, an averment that such was their duty, without stating the facts which made it their duty, was held insufficient. *Taylor v. Atlantic Mut. Ins. Co.*, 2 Bosw. 106.

104. It being settled that a corporate plaintiff need not allege its incorporation, (1 Johns. 132; 2 Cow. 770; 4 Sandf. 675; 1 Duer, 708; 13 How. Pr. 270) it follows that a complaint against a corporation need not allege its incorporation. *Lighte v. Everett Fire Ins. Co.*, 5 Bosw. 716.

105. **Damages.**—A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendant's ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiff's ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiff's damage of \$3,000, and thereof they bring suit, is sufficient. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.

106. In an action for damages for breaking defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," etc.: *Held*, that the complaint is sufficient. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.

107. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material, under our system of pleading, to require separate counts. *Id.*

108. In an action brought to recover damages by the owners of a licensed ferry

against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant run his ferry for a fee or reward, or the promise or expectation of it, or that he run it for other than his own personal use or that of his family, and that the omission of these allegations was fatal. *Hanson v. Webb*, 3 Cal. 236.

109. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 171.

110. **Damages, special.**—In an action against a Sheriff for special damages, resulting from a refusal on the part of the Sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at Sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits: *Held*, that such complaint is insufficient. *Knight v. Fair, Sheriff*, 12 Cal. 296.

111. In an action to recover damages for injuries to persons or property, it is not necessary to aver in the complaint that the acts complained of did not occur through the negligence or carelessness of the plaintiff. The same rule applies to actions against a city or county under the Act of 1855, to recover for injuries done by a mob. *Wolfe v. The Supervisors of Richmond*, 11 Abbott's Pr. 270.

112. **Deed, to compel defendant to execute.**—In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one C., and by agreement with defendant was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant upon the demand, or at any other time, has refused to execute the deed: *Held*, that the failure to aver refusal is fatal to the action, and may be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Dodge v. Clark*, 17 Cal. 586.

113. **Description.**—In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres) "the said ten rods square being situated from twenty to fifty feet, more or less, southeasterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract. The judgment for plaintiff followed the description in the complaint; defendant appeals: *Held*, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 73; see *Green v. Palmer*, 15 Id. 411.

114. **Divorce.**—The charge of adultery should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial. *Conant v. Conant*, 10 Cal. 249.

115. Where, in a suit for divorce brought by the wife, she charged on her complaint that adultery had been committed by her husband whilst she was living with him "at the city of San Francisco, at divers times, with persons to the plaintiff unknown;" and adultery committed since she ceased to live with him "at the said city of San Francisco, with divers other persons, whose names are to the plaintiff unknown:" *Held*, that the complaint was demurrable, but that the defendant, by failing to demur, waived the objection so far as the want of specification of the acts constituting the charge is concerned. The statute has not altered any of the ordinary rules of pleading for cases of divorce, except that nothing can be taken

by admission or default. The object of this exception is to prevent collusion between the parties, and when this is accomplished, the ordinary rules apply. *Id.*

116. The statute has not altered any of the ordinary rules of pleading for cases of divorce, except that nothing can be taken by admission or default. *Id.* 253.

117. The doctrine of recrimination, or *compensatio criminis*, applicable in suits for divorce, and the several offenses which by the statute constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Id.*

118. A complaint in an action for separation from bed and board, which does not specify particularly the nature and circumstances of the complaint relied on, and set forth times and places with reasonable certainty, is bad on demurrer. *Morton v. Weil*, 11 Abbott, 421.

119. **Ejectment.**—In ejectment plaintiff may aver title in general terms; but if he attempt to set forth in his complaint a specific deraignment of his title, he must aver every fact that he could be required to prove in order to recover. And where one of the links in his chain of title, as set out in the complaint, is a will, the complaint must aver that the will has been admitted to probate. *Castro v. Richardson*, 18 Cal. 478.

120. Where, in ejectment, the ouster was alleged to have taken place in June, 1856, while the title of plaintiff was alleged to have accrued only in May, 1859: *Held*, that if this were not a clerical error, it is a defect which cannot be taken advantage of after verdict. *Coryell v. Cain*, 16 Cal. 567.

121. Where plaintiff relies not on the Possessory Act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Id.*

122. A party relying on the Possessory Act of the State must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual inclosure or actual possession of the whole claim. *Id.*

123. In this case the complaint should only have averred that on some day designated plaintiffs were possessed of the land, describing it; that while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster. *Id.*

124. A complaint in ejectment should not set out the mesne conveyances through which plaintiff deraigns title. These are matters of evidence, not of pleading, and should be stricken from the complaint on motion. *Id.*

125. In actions to recover real property, the complaint need not state the residence of either of the parties; the statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Doll v. Feller*, 16 Cal. 432.

126. Where plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege such possession, and the entry, ouster and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential. In this State possession does not always accompany the legal title, as the statute authorizes a sale and conveyance of land held adversely by a third person. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

127. An allegation that the possession of defendant is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. *Id.*

128. There is no necessity, in a complaint in ejectment, of negating the possible rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense. *Id.*

129. In ejectment, the only facts necessary to be alleged are, that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that the defendant was in their possession at the commencement of the action, and withholds the possession from plaintiff. The seizin

is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyance from a paramount source of title, or by evidence of prior possession. *Id.*

130. In ejectment, a variance between the alleged seizin and right of possession of plaintiff, and the date of conveyance to him, is immaterial, if the latter be previous to the commencement of the action. Right of possession in plaintiff and occupation by defendant, at that time, are sufficient. *Stark v. Barrett*, 15 Cal. 361.

131. Complaint in ejectment need not state the exact time of the alleged ouster, especially where no claim is made for damages, and no recovery had for them—the allegation in this case, as to time of ouster, being “on or about December 12th, 1857.” *Collier v. Corbett*, 15 Cal. 183.

132. A complaint in ejectment, with general averments in the usual form, is sufficient without a specific averment of the facts. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion without benefit. *Garrison v. Sampson*, 15 Cal. 93.

133. In an action of ejectment to recover the possession of a tract of land, the plaintiff must aver either title or possession. The mere taking from the land a portion of the herbage growing thereon is not sufficient to give a right of possession. *Steinback v. Fitzpatrick*, 12 Cal. 295.

134. The allegations of the complaint must be construed most strongly against the pleader. A complaint that alleges he is in possession, in one place, and in another avers that he is not, shows no cause of action. *Dickinson v. Maguire*, 9 Cal. 46.

135. Consequently, where the plaintiff's complaint in ejectment averred title in plaintiff under a Sheriff's sale, made by one Sheriff, and a deed executed by his successor: *Held*, that the plaintiff could not recover. *Alderson v. Bell and Wife*, 9 Cal. 315.

136. To enable the plaintiff in ejectment to recover on prior possession, he must allege and prove an actual ouster. *Watson v. Zimmerman*, 6 Cal. 46.

137. The want of such an allegation in the complaint is a defect which cannot be cured by a default taken through the mistake or inadvertence of defendant's counsel. *Id.*

138. Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still, facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. *Payne v. Treadwell*, 5 Cal. 310.

139. Where the allegations of a complaint in the District Court are, that the plaintiff was in possession, and lawfully entitled to the possession, at the time he was evicted by the defendant: *Held*, that the complaint must be treated as a declaration in ejectment. *Ramirez v. Murray*, 4 Cal. 293.

140. In a possessory action, it is sufficient for the plaintiff to state that he was lawfully entitled to the possession of the premises, without setting out the evidence of his right. *Godwin v. Stebbins*, 2 Cal. 103.

141. Complaint in ejectment may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

142. Complaint in ejectment, averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, is sufficient. *Id.*

143. A complaint in ejectment, averring that plaintiff was in the actual possession of the premises by inclosure and cultivation; that defendant, on a certain day, entered upon the same, and ousted the plaintiff, and defendant is still in possession, is sufficient. *Boles v. Weifenback*, 15 Cal. 144.

144. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544.

145. Nor is a complaint in such action sufficient, which fails to aver a continued adverse holding by the defendant. *Steinback v. Fitzpatrick*, 12 Cal. 295.

146. The complaint stated that John Garner was seized of the premises in question in his own right in fee, and was in the lawful possession of them on and before the first of May, 1843; that he died so seized in that year, intestate, leaving one of the plaintiffs, his widow, and the other plaintiffs, his only heirs at law, him surviving; that those named as heirs were seized in fee and entitled to the possession,

subject to the life estate of the widow in an undivided third part thereof; that the defendants were wrongfully in possession, and claim a right thereto, and although often requested, refused to give up the possession, and unjustly withheld possession from the plaintiffs; and it prayed judgment that they deliver up possession to the plaintiffs: *Held*, a sufficient statement of a cause of action. *Garner v. The Manhattan Building Association*, 6 Duer, 539.

147. In an action for use and occupation, the plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown. *Morris v. Niles*, 12 Abbott's Pr. 103; see § 254, and authorities thereunder.

148. **Ejectment from mineral lands.**—In ejectment from mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The Court below gave judgment for plaintiff on the pleadings: *Held*, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear—the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 100.

149. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Id.* See § 254, and authorities thereunder.

150. **Equity.**—The old rules of chancery pleading are superseded by the Practice Act. *Cordier v. Schloss*, 12 Cal. 147.

151. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water and Min. Co. v. Clarkin*, 14 Cal. 544.

152. It is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and averments material to the case omitted from the pleading cannot be supplied by the evidence. *Green v. Covillaud*, 10 Cal. 317.

153. Where the complaint, in an action of trespass, asks also for the equitable interposition of the Court, if the law and equity are inseparably mixed together, it would be demurrable. *Gates v. Kieff*, 7 Cal. 124.

154. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off and the bill in equity begins. *Id.*

155. A bill filed by a creditor asking relief against fraudulent transfers and concealment of his property by the debtor, is a substantial ground of equity jurisdiction. *Swift v. Arents*, 4 Cal. 390.

156. Equity will not, in an independent action, relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentations, undue influence or misplaced confidence. *Boggs v. Hargrave*, 16 Cal. 559.

157. Where the plaintiff filed a bill in equity, setting forth that he held a deed of land, absolute on its face, from the defendant, but averring that it was in fact a mortgage made to secure a loan payable in six months, with interest: *Held*, that he could not introduce parol evidence to prove that the deed was only intended as a mortgage. *Lee v. Evans*, 8 Cal. 424.

158. A party cannot ask the rescission of a contract on account of an obstacle to its completion caused by his own fault. *Salmon v. Hoffman*, 2 Cal. 138.

159. But it is not necessary that there should be express words showing where the declaration in trespass leaves off, and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 124.

160. In an action where the setting aside of a release or account stated is neces-

sary to reach the relief sought, it is proper that the complaint should, after stating the original cause of action, set forth such defense which it is anticipated defendant will interpose, with statements which avoid the defense. 17 N. Y. 270; *Wade v. Rusher*, 4 Bosw. 537.

161. **Executors, administrators and guardians.**—The failure of the plaintiff to allege in his complaint in a suit on such claim its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action. *Hentsch v. Porter*, 10 Cal. 555.

162. But the cause of action mentioned in the Code is a present subsisting cause of action, entitling the plaintiff to judgment at the time the action was commenced. *Id.*

163. A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams v. Price*, 11 Cal. 212.

164. In such a case it is not sufficient to allege ignorance at the time of allowance, but the plaintiff must go farther and show that he could not, with the use of due diligence on his part, have made himself acquainted with, or ascertained the existence of the facts. *Id.*

165. A complaint alleging that the testator was seized and possessed of certain premises at the time of his death, on the nineteenth of July, 1855, and that the plaintiffs were appointed the executors of his last will and testament, without averring in direct terms, either previously or subsequently, the fact of the testator's death, or that he left a last will and testament, is defective as a pleading. *Hallock v. Mixer*, 16 Cal. 574.

166. The complaint here averring that plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable, on the specific ground that it does not show that plaintiffs are the executors of E., or have any authority to maintain the action, though it is subject to other objections. The complaint should state the death of E., his leaving a last will and testament, the appointment therein of the plaintiffs as executors, the probate of the will, the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors. *Id.*

167. V. having agreed with H. to render personal services in consideration of a certain compensation, part of which was to be paid monthly, and part at the end of the term, was taken sick and died after having rendered a portion only of such services: *Held*, 1st, that the executor might recover the proportionate value of the services rendered upon the special contract, by complaining upon it and setting up the excuse for its nonperformance; 2d, that he was not obliged to sue in that form, but might complain on a *quantum meruit*, leaving the defendant to allege the special contract. *Wolfe v. Howes*, 20 N. Y. (6 Smith) 197.

168. The complaint averred that the plaintiffs were the executors of L., deceased, and made profert of the letters testamentary. The answer in no way denied such executorship or such letters: *Held*, that for the purposes of the action it must be taken as true that such letters testamentary were granted, and were sufficient, and without some denial of the plaintiff's right to represent the estate, the defendants were precluded from setting up the objection on the trial. *Dart v. Farmers' Bank at Bridgeport*, 27 Barb. 337.

169. A plaintiff claiming under a will must set forth the portion of such will on which he founds his claim in his complaint. *Phinney v. Phinney*, 17 How. 197.

170. In an action by an infant appearing by guardian, an allegation in the complaint of the due appointment of the guardian, as the guardian of the infant plaintiff, is sufficient, without stating by whom, what Court, or Judge, or the order or particular manner of his appointment. So held on demurrer. *Cook v. Counsetyea*, Mass.

171. An allegation that a defendant, as executrix, controls and manages the estate of the deceased and is responsible therefor, is a conclusion of law and not a "fact." *Phinney v. Phinney*, 17 How. 197.

172. **Foreclosure.**—The averment in the complaint that the plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer, on

the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins v. Forbes and Wife*, 10 Cal. 299.

173. An action will not lie on the mere recital in a mortgage of the existence of the debt. In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness except by way of recital, it is insufficient. *Shaffer v. Bear River and Auburn W. & M. Co.*, 4 Cal. 294.

174. A general averment in the complaint, to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Hunt v. Waterman*, 12 Cal. 301.

175. The general allegation in a complaint in foreclosure, that certain of the defendants have or claim some interest in a lien upon the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, is not bad on demurrer as stating no cause of action against them. What those rights are is only important in a contest as to the surplus. *Drury v. Clark*, 16 How. 424.

176. In the case of a mortgage upon real estate, the necessity of coming into a Court of equity to have the instrument surrendered and cancelled upon the record is sufficiently apparent, without showing any reason other than the fact that the mortgage has been executed, and delivered, and placed upon record, if it is void for any cause not apparent upon its face. The statute authorizes such a proceeding without any qualification, and no Court can fail to see that a successful defense to an action at law to recover the debt would still leave the mortgage upon the record an apparent incumbrance. 16 N. Y. 519; 5 Ves. 604, 609; 7 Id. 3; *Williams v. Ayrault*, 3 Barb. 364. See sec. 246 and authorities thereunder.

177. **Foreclosure of vendor's lien.**—Where a vendor of land has taken the notes of the purchaser in payment and brings his action thereon at law, he should in that action, if at all, unite his equitable claim for a foreclosure of his lien—the same tribunal administering both law and equity. *Walker v. Sedgwick*, 8 Cal. 398.

178. **Forms and requisites.**—Requisites of a complaint in an action by a trustee for instructions respecting the trust fund arising under a railway mortgage. *Coe v. Beckwith*, 10 Abbott, 296.

179. Requisites of a complaint against a director for fraudulent representations which induced plaintiff to purchase stock. *Mabey v. Adams*, 3 Bosw. 346.

180. Form of complaint on a promissory note: *Held*, sufficient on demurrer. *Genet v. Saqre*, 12 Abbott, 347.

181. Form of complaint on recognizance and answer thereto. *People v. Shaver*, 4 Park. Cr. 45.

182. **Fraud, to set aside a conveyance or judgment or bargain for.**—*Query*: Whether a complaint, seeking to set aside a conveyance on an allegation that it was made voluntarily and without a valuable consideration, and to hinder, delay and defraud creditors, and particularly plaintiff, is demurrable, because of the generality of this allegation of fraud, and what degree of particularity in the statement of facts and circumstances is required when a fraudulent conveyance is alleged to have been made. *Kohner v. Ashenauer*, 17 Cal. 578.

183. The complaint—the suit being to set aside a judgment of *H., L. & B. v. Erwin*—after setting out minutely the proceedings adopted by them in having the Clerk enter up the judgment, then avers that “said proceedings and circumstances under which said judgment was entered up by said Clerk render the same void in law, the said Clerk having no power or jurisdiction to enter said judgment under the circumstances and in the manner stated, and that the same is fraudulent as against this plaintiff, and tends to his great and irreparable injury;” that *W.*, attorney of *H., L. & B.*, was a party to the fraud; that the judgment was without consideration—was false, covinous and fraudulent—and that *E.* is insolvent, states facts sufficient to constitute a cause of action, and *W.* being charged as a party to the fraud, is properly joined as defendant. *Crane v. Hirshfelder*, 17 Cal. 467.

184. In a bill to set aside certain conveyances of real estate as fraudulent against creditors, there is no necessary inconsistency in averring the grantee to be a fictitious person, and that the deed to him, or in his name, was made to hinder and defraud creditors. *Purkitt v. Polack*, 17 Cal. 327.

185. Plaintiff sues defendants for partition of certain property. The Court orders a sale of the property and distribution of the proceeds; after the sale, *G.* files

a petition, stating that he is creditor of one F. M. Harris (not plaintiff) and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property in fact belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable, for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors; G. asked the Court to pay him the share of the proceeds of the partition sale coming to plaintiff; Court refused: *Held*, that there was no error; that the petition of G. being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud. *Harris v. Taylor*, 15 Cal. 348.

186. A party is not confined to his remedy by statute, but may resort to a Court of equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 407.

187. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value; plaintiff sold his interest in this claim to defendant for greatly less than its value: *Held*, that in a suit by plaintiff against defendant to set aside this sale for fraud and for an account, etc., an averment that defendant is indebted to plaintiff on an account in a sum greater than that paid by defendant for the mining claim is in effect an offer to place defendant in *statu quo* as per the rule of law. *Watts v. White*, 13 Cal. 321.

188. To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. If he relies on fraud and deception practised on the Court in managing, procuring and giving evidence, he must show that by such practice he was defrauded of his opportunity to defend, and that his defense would otherwise have been effectual. *Riddle v. Baker*, 13 Cal. 295.

189. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that defendant O'D. proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud of plaintiff; that O'D. in taking said deed acted as agent and trustee of plaintiff and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to declare such trust, and execute a deed of the property to plaintiff; that on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D.; that said trust be declared; that he execute a deed to plaintiff; that H. and wife execute to plaintiff such further conveyance, and assurance, and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc., or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then plaintiff have judgment against H. and wife on said notes; that all the defendants be barred, etc., and premises sold to pay the judgments, etc. O'D. demurs that inconsistent causes of action are united: *Held*, that the demurrer is not well taken; that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D. by his purchase is one, with notice of the mortgages. *DeLeon v. Higuera*, 15 Cal. 483.



190. **Fraud, relief on account of.**—In an action for relief on this ground, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. If the plaintiff wishes in such a case to bring himself within the exception of the statute, he must allege the fact of a discovery of the fraud at a period bringing him within the exception. *Sublett v. Tinney*, 9 Cal. 423.

191. A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

192. The complaint should state the facts that constitute the fiduciary capacity, as well as its nature and extent. *Id.*

193. Fraud committed through an agent is well stated in pleading as that of the principal. If this were otherwise, and it appeared at the trial to be that of an agent without any participation of his principal, the variance is the subject of amendment and will be disregarded upon appeal. *Bennett v. Judson*, 21 N. Y. (7 Smith) 238.

194. In an action for fraudulent representations of the value of stock, whereby the plaintiff was induced to purchase it, although the complaint does not allege in terms that the defendant's representations were read by or came to the knowledge of the plaintiff, yet if it alleges that she was induced by these representations to purchase the stock of the company, and in exchange for them to convey lands, it is sufficient. This involves the knowledge of the defendant's statements by the plaintiff, and connects her contract and subsequent loss with those statements as cause and effect. So held on demurrer. *Newbury v. Garland*, 31 Barb. 121.

195. In a complaint which seeks to set aside an assignment on account of provisions which make it fraudulent on its face, it is sufficient, and (it seems) unexceptionable pleading to allege that the instrument was made to hinder, delay and defraud creditors, and is therefore fraudulent and void. It is not necessary to point out in the pleading the particular features or clauses of the instrument which are objected to. Those are matters of evidence. *Jessup v. Hulse*, 29 Barb. 539. To the same effect is *Hastings v. Thurston*, 10 Abbott, 418.

196. In an action by judgment creditors to set aside an assignment, the complaint charged fraud in the assignment, and mismanagement on the part of the assignees, and demanded that it be adjudged void; and whether it be adjudged void or not, that the assignees make discovery of the assets and account therefor: *Held*, that the Court would not grant a motion to compel plaintiffs to elect which relief they would pursue—to avoid the assignment or claim under it. Such a complaint states but one cause of action, and the Court should determine the question as to the relief at the trial. *Redmond v. Dana*, 3 Bosw. 615.

197. A complaint in an action for deceit—e. g. for falsely misrepresenting the value of stock in a corporation—must allege knowledge or an intent to deceive on defendant's part. Alleging that he "falsely and fraudulently represented" a thing to be what it is not, is not enough. *Mabey v. Adams*, 3 Bosw. 346.

198. A complaint which contained other causes of action on contract, contained a count which set forth substantially, that the plaintiffs sold and delivered to the defendant goods to a certain amount on a credit of six months; that the defendant was insolvent at the time of said sale, and purchased said goods without any intent to pay for them, and with intent to defraud the plaintiffs of their value; and that by reason of said fraud the defendant became liable to pay for the goods immediately upon their delivery. They therefore (the goods not having been paid for) demand judgment for the amount of said sales with interest. The action was brought before the expiration of the time of credit: *Held*, good on demurrer; 1st, the cause of action was not to be deemed the tort, but the contract, and the allegations of fraud inserted merely in avoidance of the term of credit which the contract contemplated.

199. No specific act on the part of the plaintiff, other than bringing the action, was necessary to manifest their intention to rescind. *Colville v. Besley*, 2 Dana, 139; *Hawkins v. Appleby*, 2 Sandf. 421; *Ash v. Putnam*, 1 Hill. 302; *Les Arts v. Leggett*, 16 N. Y. 582.

200. Fraud was sufficiently set forth to justify a rescission of the contract. *Cary v. Houghtaling*, 1 Hill. 311; *Ash v. Putnam*, Id. 302; *Root v. French*, 13 Wend. 570.

201. It seems that the better form of pleading would be to allege a sale and delivery generally, and leave the defendant to set up the express contract which the plaintiff might then show he had rightly repudiated. *Willson v. Force*, 6 Johns. 110; *Butts v. Collins*, 11 Wend. 154; *Camp v. Pulver*, 5 Barb. 91; *Roth v. Palmer*, 27 Barb. 652.

202. **Heirship.**—An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship. *Castro v. Armesti*, 14 Cal. 38.

203. **Immaterial issue.**—Pleadings should set forth facts, and not merely the opinions of parties, and must, when ambiguous, be construed most strongly against the pleader. Thus, when the complaint alleged that the plaintiff was "satisfied" that the defendant procured certain property through fraud, but there were no other allegations in the complaint showing fraud: *Held*, that the issue tendered was immaterial, it not presenting a point upon which the case could be decided on its merits. *Snow v. Halstead*, 1 Cal. 359.

204. **Injunction, what averments sufficient.**—An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered, is a sufficient statement of title in suit for injunction to restrain trespass. *Hicks v. Compton*, 18 Cal. 206.

205. A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits, in which all the claimants to the title were parties. *Knowles v. Inches*, 12 Cal. 212.

206. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392. See sec. 112, and authorities thereunder.

207. In the action against the sureties on an injunction bond, the condition of which is, that the plaintiffs in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent Court, and the complaint did not aver that any damages had been awarded: *Held*, that such complaint is fatally defective. *Tarpey v. Shillenberger*, 10 Cal. 390.

208. **Injunction, what averments insufficient.**—In a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded. *Branch Turnpike Co. v. Board of Supervisors of Yuba county*, 13 Cal. 190.

209. When suit is pending in one Court on a note of defendant, though no summons has been served, and no appearance made, he cannot bring a bill in equity in another Court to enjoin the collection of the note, or to cancel it, the averment being simply, that he has a good defense to the note. *Smith v. Sparrow*, 13 Cal. 596.

210. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to 1,000 inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the division of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages: *Held*, that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to 1,000 inches of water, on the sole ground that it

was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145. See § 112, *post*, and authorities thereunder.

211. To enjoin judgment at law on the ground of newly discovered facts.—The bill in such case is in the nature of a bill in equity for a new trial. The averments necessary in such a bill stated. *Mulford v. Cohn*, 18 Cal. 42.

212. If, as contended in this case, a judgment by default be void because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the Sheriff of the service of summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, the District Court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie.

213. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim, for the recovery of which the action was brought, or that he has a valid defense to the same. *Logan v. Hillegass*, 16 Cal. 200.

214. In a suit in equity for relief against a judgment at law, the complainant will not be entitled to relief, unless the evidence alleged in the bill to be newly discovered appears to be incontrovertible and conclusive. *Buckelew v. Chipman*, 5 Cal. 399.

215. In actions upon written instruments for the payment of money, as promissory notes, the date being shown, shows the period when the right of action accrues. In such cases, any new promise which has been made, renewing or continuing the contract, should be alleged. *Smith v. Richmond*, 19 Cal. 481.

216. In an action to recover a debt against an insolvent which has been discharged, but revived by a new promise, the complaint is always upon the original demand, and nothing is alleged of the new promise. If the discharge is pleaded, the new promise may be given in evidence by the plaintiff. *Id.* 483.

217. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc., \* \* \* defendant, by virtue of \* \* \* proceedings in insolvency, etc., \* \* \* claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge aforesaid, on or about \* \* \* defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc.: *Held*, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 501.

218. Libel.—In an action for an alleged libel, a variance between the date of the libel, as set forth in the complaint—the twenty-third of June—is not material, unless the defense is misled by it. *Thrall v. Smiley*, 9 Cal. 529.

219. The complaint averred that the defendant was the proprietor of the paper, and that the libelous matter was published in his paper: *Held*, a sufficient averment of a publication by him. *The King v. Gutch*, 1 Mood. & M. 433; *The King v. Alman*, 5 Burr. 2, 689; 2 Starkie on Slander, 30; *Hunt v. Bennett*, 4 E. D. Smith's C. P. R. 647.

220. It seems that the only change made by the Code in the requisite allegations in an action of defamation, is to dispense with averments of extrinsic facts, showing the applicability of the slander to the plaintiff, (Code, § 164; 5 How. 171; 6 Id. 99) leaving it still necessary, as formerly, to aver and prove any facts necessary to explain the meaning of the words, and to allege that the words were spoken of and concerning the plaintiff. *Dias v. Short*, 16 How. Pr. R. 322.

221. The only cases in which it is necessary, in order to sustain an action for defamation, to allege the manner in which the publication has injured the plaintiff, are cases where it is of such a character that the Court cannot see that its tendency and effect would be to defame or degrade the plaintiff, or to render him odious or contemptible. 2 Den. 299; *Perkins v. Mitchell*, 31 Barb. 461.

**222. Malicious prosecution.**—In an action for malicious prosecution on *v.* the substantial matter constituting the action, that is facts, and not the evidence of facts, need be set out. *Dreux v. Domec*, 18 Cal. 83.

**223.** An action of conspiracy for unjustly prosecuting a party also lies, but probably differs in form at least from an action for malicious prosecution. The gist of an action of conspiracy is the "conspiracy"—the combining of two or more to do an unlawful and injurious act, and acquittal or termination of the prosecution is necessary to maintain the suit. *Id.*

**224.** In suit against three defendants for malicious prosecution, the complaint averred that "defendants contriving and maliciously intending to injure the plaintiff," etc., falsely, maliciously and without probable cause, procured him to be indicted for murder: *Held*, that the complaint sufficiently avers a joint agency on the part of defendants in instituting the prosecution. *Id.*

**225.** In an action against a defendant for maliciously and falsely obtaining an order of arrest against the plaintiff, as defendant in another action, if the order of arrest set forth in the complaint is not void, the complaint is bad on demurrer, if it does not state that the order was vacated or judgment was rendered for defendant, or otherwise show that it has been avoided by competent authority. *Reynolds v. Cross*, 3 Cal. R. 271; *Burt v. Place*, 4 Wend. 597; *Searle v. McCracken*, 16 How. Pr. R. 262.

**226.** A complaint for malicious prosecution is bad on demurrer, unless it shows a sufficient determination of the prosecution. *Thomason v. Demotte*, 9 Abbott's Pr. 242.

**227.** In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive—*e. g.*, a malicious publication by him procured to be made concerning the prosecution—such as would be proper to aver at the trial, as showing special injury. Such averments should not be struck out on motion, as the plaintiff cannot be deemed aggrieved by them. *Brockleman v. Braudt*, 10 Abbott's Pr. 141.

**228.** In an action for false imprisonment, the particular instrumentality by which the plaintiff was deprived of his liberty should not be set out in the complaint. *Eddy v. Beach*, 7 Abbott's Pr. 17.

**229. Mandamus.**—A complaint in *mandamus*, against the Comptroller, is bad if it fails to allege that there is "money not otherwise appropriated by law" out of which the compensation in question is to be paid. *Redding v. Bell*, 4 Cal. 333; see § 467, and authorities thereunder.

**230. Married woman, for her separate debt.**—In suit against the wife for her separate debt, for which she was liable in *personam* before coverture, the complaint need not set out any separate property of the wife. *Bostic v. Love*, 16 Cal. 69.

**231.** A complaint which alleges that a sale and delivery was to the husband, instead of alleging a sale and delivery to the wife on the faith of or for the benefit of her separate estate, is not sufficient to charge such estate with the price. *Arnold v. Ringold*, 16 How. Pr. R. 158.

**232.** The complaint alleged a sale to the defendant, a married woman, and that it was made on the credit of her separate estate: *Held*, insufficient on demurrer. The complaint, to hold liable the separate estate of a married woman, must show a sale for the benefit of such estate, or a pledge of it. *Bass v. Bean*, 16 How. Pr. R. 93.

**233.** Necessary allegations in complaint against a married woman. *Query*: Whether want of particulars of estate is a demurrable defect. *Palen v. Lent*, 5 Bosw. 713.

**234. Nuisance.**—Plaintiffs owned certain mining claims and a quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey v. Chilton*, 11 Cal. 114.

235. After an action and recovery for erecting a nuisance, a second action was brought upon the same ground, it having been continued meanwhile. The complaint in this action set forth the erection of the nuisance, without any reference to the former action: *Held*, 1. That the former recovery was not a bar to the action. 2. That the complaint was sufficient, though it would have been better to refer to the former action, and to state that the damage complained of was only for such as had accrued since the former recovery. *Yates'* Pl. 251; 2 Chit. Pl. 333; see § 249, and authorities thereunder.

236. **Partners.**—Where plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a certain sum of money and materials for a saw mill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use: *Held*, that plaintiffs had a right to sue therefor at law, and for damages caused by defendants' violation of the partnership contract. *Crosby v. McDermitt*, 7 Cal. 146.

237. **Prayer for relief.**—Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause, where an answer is filed. *Rollins v. Forbes and Wife*, 10 Cal. 299.

238. Although the prayer of a bill be inartificially framed, the Court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform with the bill. *Truebody v. Jacobson*, 2 Cal. 269.

239. Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the case presented. *The People v. Turner*, 1 Cal. 152.

240. When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damages of the plaintiff against the form of the statute. *Chipman v. Emeric*, 5 Cal. 239.

241. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent further injury is proper. *Marius v. Bicknell*, 10 Cal. 217.

242. It does not follow from demanding a multiplicity of relief, that a complaint is bad as stating more than one cause of action. *Geery v. N. Y. & Liverpool Steamship Co.*, 12 Abbott, 268.

243. The complaint asked that a deed of trust should be declared "void, null, and of no effect," and also "for such further or other relief as may be agreeable to equity and good conscience:" *Held*, that although the deed could not be declared to be void, yet under the general prayer of the complaint the Court might allow it to be reformed by inserting in it a power of revocation. *Grafton v. Remsen*, 16 How. 32.

244. Where the facts sufficiently appear in the complaint, the Court is to give such relief as the parties are entitled to, whether asked for or not in the prayer of the complaint. 2 Kern. 336; *Jones v. Butler*, 20 How. 189.

245. A complaint is not bad as stating cause of action, merely because the relief demanded is wholly unwarranted by the facts stated. The Court should grant such relief as the facts warrant. *Emery v. Pease*, 20 N. Y. (6 Smith) 62.

246. It seems that a complaint asking in the alternative judgment for either one of two parties plaintiff, is bad on demurrer. *Warwick v. The Mayor, etc., of New York*, 7 Abbott, 265.

247. The relief granted to a plaintiff in a case in which there is no answer cannot exceed that which is specifically demanded in the complaint. It is not enough for him to state facts entitling him to the relief; he must also ask it. *Simonson v. Blake*, 12 Abbott, 331.

248. **Receiver.**—A receiver, bringing an action, must state in his complaint the time and mode of his appointment, so that issue may be taken thereon. Describing himself as "having been duly appointed receiver of, &c., and bringing this suit by order of the Supreme Court," is insufficient on demurrer. 4 Duer, 80;

23 Barb. 596; 5 Duer, 672; 13 How. Pr. 413; 7 Barb. 206; 3 Kern. 83; *Dayton v. Connah*, 18 How. Pr. 326.

249. Requisites of complaint in an action by a receiver. *Ante*, 205, 206, notes.

250. That the complaint in an action by the receiver of a mutual insurance company on a premium note, must show the liabilities of the company. *Thomas v. Wallon*, 13 Barb. 172.

251. The objection that a plaintiff suing as receiver of a corporation does not show that his appointment was founded on a petition, does not apply where the receiver was appointed on consent of the corporation, in an action brought under section forty-second of Revised Statutes, page four hundred and sixty-three. *Inckerman v. Brown*, 11 Abbott's Pr. 389.

252. **Replevin.**—A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of \$1,000—the alleged value of the wood—sufficiently shows plaintiffs' ownership of the wood. *Halleck v. Mixer*, 16 Cal. 574.

253. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Id.*

254. In an action to recover the possession of goods, on the ground that they were obtained from the plaintiff by false representations, the plaintiff may declare generally the property as his, and give the special facts in evidence on the trial to establish the fraud. (Approving 20 Barb. 493); *Bliss v. Cottle*, 32 Barb. 322.

255. The complaint, in an action by a Sheriff to recover possession of property which he has attached, should aver the issuing of a warrant of attachment, which is his sole and sufficient authority, but it need not show how or under what circumstances the warrant was obtained. An allegation, in such a case, that the plaintiff made due service of the attachment, by delivering to and leaving with the defendant a certified copy of the warrant and a notice showing the property levied on, is on demurrer a sufficient averment of the execution of the attachment. *Kelly v. Brensing*, 32 Barb. 601; see § 99, and authorities thereunder.

256. **Sheriff.**—A complaint against a Sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets out that the Sheriff was in possession of a certain execution against plaintiff J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of \$2,000, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. No damage has, or can result from such a sale. If the property sold was a homestead, the Sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Kendall and Wife v. Clark*, 10 Cal. 17.

257. In an action against a Sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Killey v. Scannell*, 12 Cal. 73.

258. In an action against a Sheriff for special damages, resulting from a refusal on the part of the Sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at Sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits: *Held*, that such complaint is insufficient. *Knight v. Fair*, 12 Cal. 296.

259. An averment in a complaint that the plaintiff is Sheriff of the city and county of New York, duly elected, qualified and acting, is sufficient to show the capacity of the plaintiff to maintain any action which such Sheriff is authorized to bring. *Kelly v. Brensing*, 32 Barb. 601.

260. In an action against a public officer for damages, incurred by his neglect of duty, the complaint must show the facts out of which a duty arose. *Barlett v. Crozier*, 17 Johns. 457; *Smith v. Wright*, 27 Barb. 621.

261. In an action against an officer for levying upon goods exempt from execution, it is not necessary to show in the complaint that the goods were exempt. It is sufficient for the plaintiff to allege an unlawful taking. If the defendant had any authority to take the plaintiff's property, he is bound to set it up in the pleadings, and prove it as matter of defense. *Stevens v. Somerindyke*, 4 E. D. Smith's C. P. R. 418.

262. In an action against a Sheriff for breach of duty in the execution of process which he received, it is not necessary that the complaint should show the several steps in the action on which the mere regularity of a process depends. It is enough, after showing jurisdiction to issue the process, to allege that it was duly issued. *French v. Willet*, 10 Abbott's Pr. 99.

263. **Sole Trader.**—Where husband and wife are sued for rent claimed on a lease made by plaintiff to the wife, plaintiff and the wife being tenants in common of the property: *Held*, that the wife can be liable only as sole trader under the statute; and that the complaint must aver facts requisite to establish her liability in that character, and that the allegation that she "was doing business as a *femme sole*, with the consent of her husband," is insufficient. *Aikens v. Ann Davis and her Husband*, 17 Cal. 119.

264. Of the liability of a married woman, on a complaint seeking to charge her separate estate with a note indorsed by her. *Sexton v. Fleet*, 2 Hill, 477.

265. **Title.**—Where the complaint in ejectment avers that the land sued for is known by the name of "La Jota," heretofore granted to plaintiff by the Mexican Government, and the patent issued thereon refers to the grant, the proceedings before the Land Commission and the United States Court for confirmation, these recitals in the patent support the averment of title through the grant. *Yount v. Howell*, 14 Cal. 465.

266. **Trespass.**—Action for damages against defendants, averring that they, "with force and arms, broke and entered" upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water: *Held*, that, under our system of pleading, the words "with force and arms, broke and entered," do not confine the proof to the direct and immediate damages, as in the old action of trespass, and the facts being clearly set out in the complaint, an addition of these words was surplusage. *Darst v. Rush*, 14 Cal. 81.

267. Possession in the plaintiff is sufficient to enable him to maintain trespass, and, although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron v. O'Connell*, 7 Cal. 152.

268. Where the complaint in an action of trespass asks, also, for the equitable interposition of the Court, if the law and equity are inseparably mixed together, it would be demurrable. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 124.

269. Where a partnership exists between two persons in the purchase of goods, and they subsequently bring suit to recover their value from a trespasser who has seized them: *Held*, that one partner is competent to execute a release in the name of himself and copartner. *Pertberg v. Gorham*, 10 Cal. 120.

270. **Trover.**—The conversion is the gist of the action of trover, and without conversion neither possession of property, negligence nor misfortune will enable the action to be maintained. *Rogers v. Huie*, 2 Cal. 571.

271. To render defendant liable to the action, he must have converted the property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either expressed or implied. *Id.*

272. In an action by a mortgagee of chattels against one who has wrongfully taken them, it is not necessary to allege in the complaint that the mortgage was filed, nor that plaintiff made demand before suit. *Moses v. Walker*, 2 Hill, 536.

273. The plaintiff cannot, upon a complaint charging a conversion of personal

property after its assignment to him, recover for a conversion before its assignment. The case is not that of a variance, but the causes of action are entirely distinct. *Whitaker v. Merrill*, 30 Barb. 389.

274. A complaint for money received by an agent, as such, who pretends to have been robbed thereof, may properly allege simply that the defendant, being in possession of the plaintiff's property, as his agent, converted the same to his own use. *Frost v. M'Carger*, 29 Barb. 617.

**275. Undertakings, statutory bonds and sealed instruments.**

—Suit on a recognizance in the form prescribed in section five hundred and twenty-three of the Criminal Practice Act. Wood's Dig. art. 1728. The complaint alleged substantially that G. was indicted for gaming and arrested, and that then defendant executed the recognizance which is set out; that G. appeared at the first term of the Court thereafter and plead not guilty, and case continued to next term, at which time the case being called for trial G. did not appear, and the defendants, though "called," did not produce his body; that the Court then made an order forfeiting the recognizance, and that defendants did not produce the body of G. before the final adjournment of the Court: *Held*, on demurrer, that the complaint states a cause of action; that the objection that gaming being a misdemeanor, G. could appear by attorney, cannot avail, because there is nothing to show that he offered so to appear, even assuming that such matter could be here set up against the judgment of forfeiture in the Court of Sessions. *People v. Smith*, 18 Cal. 498.

276. In suit on a statutory undertaking given to release property attached and reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings. *McMillan v. Dana*, 18 Cal. 339.

277. An averment in the complaint in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The nonpayment of the judgment can be shown without issuing an execution. *Tissot and Wife v. Darling*, 9 Cal. 278.

278. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson v. Blattan*, 9 Cal. 500.

279. In an action on a bond given to release property from attachment, the complaint should state that the property was released upon the execution and delivery of the bond. To charge the obligors, it is necessary to state the consideration of the undertaking; and a mere reference to the condition of the bond itself, wherein such release is stated as a consideration, is insufficient. *Palmer v. Melvin*, 6 Cal. 651.

280. If a bond has to be executed by the plaintiff and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Morgan v. Thrift*, 2 Cal. 562.

281. No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. *People v. Edwards*, 9 Cal. 286.

282. Where defendant in attachment applies to the Court under sections one hundred and thirty-six and one hundred and thirty-seven of the Practice Act, for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: *Held*, in suit against the sureties on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *McMillan v. Dana*, 18 Cal. 339.

283. An action on the official bond of a constable lies primarily upon breach of



the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the nonfeasance or misfeasance of the officer. *Van Pelt v. Littler*, 14 Cal. 194.

284. A complaint upon an undertaking given under section one hundred and two of the Practice Act, which refers only to the section without setting forth the material portions of the undertaking, is insufficient. *Mills v. Gleason*, Oct. 1861.

285. But the objection should be taken by demurrer, it being a defect rather of form than of substance. *Id.*

286. Of the requisites of a complaint on a bond, the consideration of which is purely statutory. *Clarke v. Throp*, 2 Bosw. 680.

287. The complaint on an undertaking given on appeal to the Court of Appeals alleged that the party appealed, and that upon said appeal the defendants "made and filed with the Clerk of this Court, for the use of the plaintiff," the undertaking in question, and that the appeal had been further prosecuted in the Court of Appeals, and the judgment appealed from affirmed there, but it did not state that the undertaking was accompanied by the affidavits of the sureties, as required by section three hundred and forty-one of the Code: *Held*, on demurrer, sufficient. The undertaking is not a nullity without such affidavit, and the presumption is that the requirements of the Code were complied with. *Gibbons v. Berkard*, 3 Bosw. 635.

288. No action can be maintained on a recognizance of bail taken by an officer out of Court, until it has been filed with the Clerk of the county in which the party bailed was imprisoned, and the complaint on such a recognizance must therefore allege the filing thereof with such Clerk. 10 Wend. 472; 4 Id. 393; *People v. Sharer*, 4 Park. Cr. 45.

289. In suit upon an agreement under seal, the complaint setting out the agreement in *hæc verba*, need not aver any consideration for the agreement. The seal imparts a consideration. *Mills v. Kempt*, 17 Cal. 98.

290. Where the condition of a bond is to pay the debt of another, the condition operates merely by way of defeasance, and if a defendant chooses to put his obligation in that form, he selects to be originally liable. A bond should be sued on, setting out breaches and damages. Assumpsit on the condition would be had on demurrer. *Baker v. Cornwall*, 4 Cal. 15.

291. In a complaint on a bond, it is not necessary to allege the loss of the bond in order to give secondary evidence of its contents. *Supervisors of Livingston v. White*, 30 Barb. 72.

292. The delivery of a specialty, though essential to its validity, need not be stated in pleading. 1 Chitt. Pl. 348; 1 Saund. 291; 10 How. Pr. 274; 12 Id. 452; 15 N. Y. 425; *Lafayette Ins. Co. v. Rogers*, 30 Barb. 491.

293. **Water, diversion of.**—In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald & Blackburn v. Bear River and Auburn Water and Mining Co.*, 13 Cal. 220.

294. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Leigh & Co. v. Ind. Ditch Co.*, 8 Cal. 323.

295. A complaint alleging that plaintiffs are the owners, and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Id.*

296. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

297. The union, in one count of a complaint, of an allegation, that defendants "have wrongfully built dams and flumes across said Mormon creek \* \* \* so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in

their said dams and flumes, which they \* \* \* hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

298. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means, is not important enough to require several counts. *Id.*

299. **Wife, for a division of the common property.**—In an action for the division of the common property of husband and wife after a decree of divorce, the plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17th, 1850, must affirmatively state such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 163.

300. In an action for a division of the common property after a divorce, where it appears that the property in question had been in the possession of the husband before marriage without title, and that he purchased the property and obtained deeds therefor after marriage, the purchase money being paid with the common funds: *Held*, that it was common property: *Held further*, that the defendant having purchased with the common funds from another, under a deed of warranty, he is estopped to deny, as far as plaintiff is concerned, that he acquired a good title by the purchase. *Johnson v. Johnson*, 11 Cal. 200.

301. Where the plaintiff averred in her complaint, in a suit brought for her distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, when she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes, she thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do: *Held*, that these were insufficient averments of the existence of a marriage, and that the facts averred were only *prima facie* evidence of a marriage. *Letter v. Cady*, 10 Cal. 533.

302. **When pleadings may be read to the jury.**—Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry & Water Co.*, 14 Cal. 35.

#### § 40. *When defendant may demur.*

[1859.] The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1st. That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2d. That the plaintiff has not legal capacity to sue; or,

3d. That there is another action pending between the same parties for the same cause; or,

4th. That there is a defect or misjoinder of parties, plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. That the complaint does not state facts sufficient to constitute a cause of action; or,

7th. That the complaint is ambiguous, unintelligible or uncertain.

N. Y. Code, § 144.

1. **First subdivision.**—A demurrer on the ground "that the Court has no jurisdiction either of the persons of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit, under the rule of construction adopted by the Courts of this State. *Ellissen v. Halleck*, 6 Cal. 386.

2. Demurrer to the jurisdiction of a Court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint. Otherwise, of Courts of limited and special jurisdiction—there, every fact essential to confer jurisdiction must be alleged. *Doll v. Feller*, 16 Cal. 432.

3. **Second subdivision.**—Where an injury to joint property is alleged in the complaint, and it is averred that one of the joint owners has assigned his claim therefor to the other, who brings this action for damages in his own name alone, the complaint is demurrable. *Oliver v. Walsh*, 6 Cal. 456.

4. The fact that a vessel, lost while being towed out to sea, is insured, does not divest the owner of the right of action for her loss, and his recovery will bar another action for the same cause, and, therefore, the defendant cannot raise the objection that the action is not brought by the real party in interest. 6 Cal. 462.

5. **Third subdivision.**—A sued B for twenty-two head of cattle and two wagons, and recovered a verdict for twelve head and the wagons, which was accepted by A, and allowed to stand. C, who held under B, was afterwards sued by A for the remainder of the cattle: *Held*, that if A had commenced another suit against B, his former recovery would have been a complete bar to the action, and that if B could plead the former recovery in bar, so could C, who claimed immediately through B. *Cunningham v. Harris*, 5 Cal. 81.

6. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover the value. Defendants plead the former recovery as a bar: *Held*, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not having been satisfied. *Nickerson v. Cal. Stage Co.*, 10 Cal. 520.

7. Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was held bad on demurrer, and was ordered to be dismissed. 3 Cal. 327.

8. **Fourth subdivision.**—Where a defect of parties is apparent upon the face of the complaint, the objection must be taken by demurrer, or the same will be waived. *Dunn v. Tozer*, 10 Cal. 167; *Mott v. Smith*, 16 Id. 557; *Sampson v. Shaffer*, 3 Id. 202; *Warner v. Wilson*, 4 Id. 313; *Beard v. Knox*, 5 Id. 257; *Tissot v. Throckmorton*, 6 Id. 473; *McKeene v. McGarvey*, 6 Id. 498.

9. The objection that a wife is improperly joined with the husband as party plaintiff should be taken advantage of by demurrer, and comes too late on appeal. *Tissot v. Throckmorton*, 6 Cal. 471.

10. Objection to the misjoinder or nonjoinder of parties must be made by demurrer, when the defect appears on the face of the complaint. *Burroughs v. Lott*, 19 Cal. 125.

11. It follows, that where an injury to joint property is alleged in the complaint, and it is averred that one of the joint owners has assigned his claim therefor to the other, who brings this action for damages in his own name alone, the complaint is demurrable. *Oliver v. Walsh*, 6 Cal. 456.

12. A defendant may demur if there is a misjoinder; for the words, "defects of parties," in the Code, mean defect in the complaint by reason of too many or too few parties. *Rovee v. Chandler*, 1 Cal. 174.

13. Though the defendant, in such an action, be described in the caption of the complaint as administrator, yet the facts show that it is not sought to charge him as administrator, and no relief is sought against the estate: *Held*, that the objection that he is sued in his representative capacity is untenable. *People v. Hough-taling*, 7 Cal. 348.

14. It is no ground of demurrer to a complaint, that the Christian name of one of the plaintiffs does not appear. *Nelson & Doble v. Highland*, 13 Cal. 74.

15. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there, and consequent illness, and other injuries, though based on a contract sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner and Wife v. Steamer Uncle Sam*, 9 Cal. 697.

16. Per FIELD, C. J. dissenting.—Such an action is confessedly based upon the provision of the statute rendering steamers liable for breaches of contracts for the transportation of passengers or property. The contract is the substantial cause of action, and the injuries received are alleged by way of special damage. The wife is, therefore, not a proper party plaintiff, and a complaint making her a party is demurrable. *Id.*

17. Where the defendant, as Sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office another attaching creditor attaches the surplus, and seeks to make the ex Sheriff liable therefor, on his official bond: *Held*, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render defendant officially liable. *Graham v. Endicott*, 7 Cal. 144.

18. A demurrer to a complaint on the ground "that the complaint does not state facts sufficient to constitute a cause of action," and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties. *Summers v. Farish*, 10 Cal. 347.

19. The mere joinder of too many defendants is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of action. *New York and New Haven R. R. Co. v. Schuyler*, ante, 41.

20. It is not within the office of a demurrer to state objections not apparent upon the face of the complaint—*e. g.*, to name parties who should have been joined—and no conclusion is to be drawn from such statement adverse to the plaintiff. *Coe v. Beckwith*, 10 Abbott's Pr. 296.

21. In an action against husband and wife, concerning the separate property of the wife, and seeking no judgment against the husband, the husband is a proper party; and he cannot sustain a separate demurrer on the ground that the complaint states no cause of action against him, even though the complaint is insufficient as against the wife. *Goelet v. Gori*, 31 Barb. 314.

22. **Fifth subdivision.**—Suit on a recognizance given before a Justice for the appearance of defendant S. to answer a criminal charge. The complaint, after setting out the cause of action on the recognizance, avers that S., to secure his sureties, executed a trust deed to T. of certain warrants and money. This deed provides that in case the recognizance be forfeited, and the sureties become liable thereon, the trustee is to apply the property to the payment, so far as it will go, of the recognizance. The complaint asks to have this property so applied: *Held*, that a demurrer for misjoinder of causes of action lies; that the trust deed has nothing to do with the liabilities of the sureties. *People v. Skidmore*, 17 Cal. 260.

23. If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Mucondray v. Simmons*, 1 Cal. 293; 10 Id. 217.

24. The plaintiff having a claim against A., brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A. to B. on the ground that it was executed in fraud of the creditors of A., and made B. a party to the suit: *Held*, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A. to B. *Macondray v. Simmons*, 1 Cal. 293.

25. Objections to the misjoinder of parties and of causes of action should be taken by demurrer or answer, or they are deemed waived. *Jacks v. Cooke*, 6 Cal. 164.

26. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculations of every kind for a certain period of time, although the parties may not have been technically partners. *Garrman v. Redman*, 6 Cal. 574.

27. Nor is it a misjoinder of causes of action to demand, in the same action, that defendant account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Id.*

28. The union, in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek, \* \* so as to turn the waters of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants have wrongfully built dams and flumes, which they hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel, the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

29. A complaint which joins an action of "trespass quare clausum fregit," ejectment, and prayer for relief in chancery, will be held bad on demurrer. To sustain such a complaint would be subversive of all the rules of pleading. *Bigelow v. Gore*, 7 Cal. 133.

30. This Court will not resort to the rules of construction to determine the species of relief demanded. *Id.*

31. Where the complaint in an action of trespass asks, also, for the equitable interposition of the Court, if the law and equity are inseparably mixed together, it would be demurrable. *Gates v. Kieff*, 7 Cal. 124.

32. A demurrer to a complaint on the ground that it seeks a remedy at law, and also seeks for equitable relief, is bad. *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, *Id.* 237; *Rollins v. Forbes*, *Id.* 300.

33. There is no misjoinder of actions in an action against husband and wife to foreclose a mortgage executed by husband and wife to secure a note given by the husband alone, where the prayer of the complaint was for judgment against the husband, and a decree against the husband and wife for a sale of the premises. *Rollins v. Forbes*, 10 Cal. 299.

34. The objection to plaintiff's omission to comply with the rule requiring each cause of action to be numbered and separately stated, is not available under a demurrer which merely specifies that several causes of action are improperly united. *Badger v. Benedict*, 1 Hilt. 414.

35. **Sixth subdivision.**—An omission to allege delivery in a suit on a bond can be taken advantage of only on demurrer, or the defect is cured by a verdict. *Garcia v. Latrasteguis*, 4 Cal. 244.

36. A complaint for money had and received, which fails to allege a demand, is bad on demurrer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

37. The failure of the plaintiff to allege in his complaint, in an action upon a claim against an estate, its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action. *Ellisen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, *Id.* 412; *Hentsch v. Porter*, 10 *Id.* 558.

38. The statute provides that no person shall sue a county, unless the claim has been first presented to the Board of Supervisors, and been by them rejected; this fact must appear in the complaint, or it is demurrable. *McCann v. Sierra County*, 7 Cal. 123.

39. The sixth ground of demurrer, as specified in section forty of the Practice Act, "that the complaint does not state facts sufficient to constitute a cause of action," is confined to those cases in which no cause of action at all, as against the defendants, arises from the complaint. *Summers v. Farish*, 10 Cal. 347.

40. A demurrer to the whole declaration, when some of the counts are good, should be overruled. *Whiting v. Heslep*, 4 Cal. 327.

41. To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law. *Lupton v. Lupton*, 3 Cal. 120.

42. If the bill discloses such remedy at law, it will be dismissed upon demurrer. *Id.*

43. When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the Court below. It is too late to urge such defect after verdict. *Happe v. Stout*, 2 Cal. 460.

44. Where a complaint, though defective, states facts sufficient to constitute a

cause of action, the objection to it should be taken by demurrer. *Greenfield v. Steamer Gunnell*, 6 Cal. 67.

45. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill, which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey v. Chilton*, 11 Cal. 114.

46. Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an account as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint: *Held*, that the demurrer must be overruled. *Young v. Pierson*, 1 Cal. 440.

47. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson v. Blattan*, 9 Cal. 500.

48. A failure to do so is fatal, and the defect may be taken advantage of by demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action. *Id.*

49. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays for an injunction, and damages for the occupation: *Held*, that the complaint does not state facts sufficient to constitute a cause of action. *O'Conner v. Corbett*, 3 Cal. 371.

50. The statute does not require an allegation in the complaint of possession. An averment that the premises are unlawfully withheld from plaintiff is somewhat general, yet not insufficient, in a Justice's Court, except upon demurrer. *Cronise v. Carghill*, 4 Cal. 122.

51. In an action to recover damages, by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family; and the omission of those allegations was fatal. *Hanson v. Webb*, 3 Cal. 237.

52. Where the payment of a promissory note is, by agreement of parties, made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made, or it is demurrable. *Rogers v. Cody*, 8 Cal. 324.

53. A complaint, alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a warrantee that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 209.

54. If a complaint containing several causes of action is demurred to, on the ground that the several counts do not state facts sufficient to constitute a cause of action, the demurrer must be overruled, unless all the statements are insufficient. *Martin v. Mattison*, 8 Abbott's Pr. 3.

55. Substantial and radical defects in a complaint may be reached under the general allegation in a demurrer that it does not state facts sufficient to constitute a cause of action. *Spear v. Downing*, 12 Abbott's Pr. 437.

56. Where a demurrer to the whole complaint is interposed, and the same is not good as to all, the demurrer should be overruled. *Weaver v. Conger*, 10 Cal. 233.

57. A demurrer to the whole complaint: *Held*, properly overruled, if the complaint could be sustained in either of the two aspects which it presented. *Newberry v. Garland*, 31 Barb. 121.

58. What is or not a demurrer.—An allegation in an answer that the

debt sued for, if due at all, is due to plaintiff and another, as partners, cannot be treated as a demurrer. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 330.

59. The test whether a defense is an answer or demurrer is: Does it require any facts to be proved to sustain it? *Struver v. The Ocean Insurance Co.*, 16 How. Pr. R. 422.

60. **When demurrer will be deemed waived.**—The objection that there is a defect of parties to the complaint must be taken by demurrer or answer, or it will be deemed to have been waived; but the defendant may object on the trial, if the proof does not sustain plaintiff's allegations, as to his right of action. *Alvarez v. Brannan*, 7 Cal. 503.

61. Where an administrator does not set up his privileges by demurrer or answer, but suffers judgment to go by default, it is a confession that he is properly sued. *Hentsch v. Porter*, 10 Cal. 555.

62. Where the defendants demurred to a complaint for a misjoinder of parties plaintiff, and the Court overruled the demurrer, and the plaintiffs then moved to amend the complaint by striking out the names of the plaintiffs thus alleged to be improperly joined, and the defendants resisted successfully such motion: *Held*, that such action on the part of defendants was a waiver of the objection of misjoinder raised by their demurrer. *Summers v. Farish*, 10 Cal. 347.

63. **Objection must appear on the face of the pleading.**—If every fact essential to the claim or defense be not stated, the adverse party may demur; and if any fact not essential to the claim or defense—in other words, any except *issuable facts* be stated, the adverse party may move to strike out the unessential parts. *Green v. Palmer*, 15 Cal. 411.

64. There are six causes for which a demurrer may be interposed, under section forty of the Code; and unless a ground of demurrer be included under one or more of such causes, it cannot be sustained. *Heutsch v. Porter*, 10 Cal. 555.

65. A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer. *Id.*

66. Where a complaint shows *prima facie* upon the facts stated, that the claim or debt upon which suit is brought is barred by the Statute of Limitations, the defendant may take advantage of the defect by demurrer; but where the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained on this ground. This is the chancery rule, under the English system, and as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the former. *Barringer v. Warden*, 12 Cal. 311.

67. When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the Court below. *Happe v. Stout*, 2 Cal. 460.

68. An omission to allege delivery in a suit on a bond can be taken advantage of only on demurrer. *Garcia v. Satrustigui*, 4 Cal. 244.

69. **Action, when barred by lapse of time.**—When it appears upon the face of a bill in equity that the suit is barred by lapse of time, the defendant may demur. *Sublett v. Tinney*, 9 Cal. 423.

70. A demurrer will lie to a complaint showing on its face that the cause of action accrued without the time prescribed by the statute to commence actions. *Smith v. Richmond*, 19 Cal. 476.

71. In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. *Sublett v. Tinney*, 9 Cal. 423.

72. Where a complaint shows *prima facie* upon the facts stated that the claim or debt upon which suit is brought is barred by the Statute of Limitations, the defendant may take advantage of the defect by demurrer. But where the complaint does not directly show *prima facie* a case for the operation of the statute, a demurrer cannot be sustained on this ground. This is the chancery rule, under the English system, and as our pleadings approximate more nearly to the chancery than the common law form, we have adopted the former. *Barringer v. Warden*, 12 Cal. 311.

73. Although demurrer lies when the facts stated in the complaint show the action to be barred by the Statute of Limitations, the bar of the statute must clearly appear. *Ord v. De la Guerra*, 18 Cal. 67.

74. **When it will not lie.**—A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as agent of the defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cockran v. Goodman*, 3 Cal. 245.

75. In an action for the breach of a contract, the want of any averment of special damage cannot be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of contract an action lies, though no actual damage be sustained. *McCarthy v. Beach*, 10 Cal. 461.

76. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson & Doble v. Highland*, 13 Cal. 74.

77. Objections to a declaration, when they arise from matters of form, are not the subject of a demurrer. *Ottero v. Bullard*, 3 Cal. 188.

78. Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and even in the absence of such clause when an answer is filed. *Rollins v. Forbes and Wife*, 10 Cal. 299.

79. Where a complaint, filed to compel a partnership account, contained sufficient to call upon defendants for an account as to a particular branch of their business, but was in other respects inartificially drawn and insufficient, and a demurrer was put in to the whole complaint: *Held*, that the demurrer must be overruled. *Young v. Pierson*, 1 Cal. 448.

80. In a suit by a physician against a county on a contract for his services for one year as Examining Physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 444.

81. Where a bill alleges a parol trust, it seems that it must be denied; and a general demurrer will not lie. *Peralta v. Castro*, 6 Cal. 354.

82. A complaint which demands more relief than can be awarded is not demurrable on that ground. *Moses v. Walker*, 2 Hilt. 536.

83. Plaintiff cannot demur to a defense consisting of denials merely. He can demur only when the new matter in the answer, upon its face, does not constitute a counter-claim or defense. *Rice v. O'Connor*, 10 Abbott's Pr. 362.

84. A demurrer to a complaint in an action for defamation is not to be sustained on the ground that the communication was privileged, as being testimony in a legal proceeding, unless it appears by the complaint either that the proceeding was legally and properly instituted, or that the testimony was compulsory. *Perkins v. Mitchell*, 31 Barb. 461.

85. The complaint averred that the defendant on, etc., for value received, made and delivered to the said plaintiff his promissory note, in writing, and payable to the order of the plaintiff, and indorsed by him, of which the following is a copy. (Here followed a copy.) That there is due and owing the said plaintiff the said sum of two hundred and four dollars and sixty-seven cents, with interest thereon from, etc., wherefore plaintiff demands judgment, etc.: *Held*, sufficient, and that a demurrer on the ground that it is not stated or averred that the plaintiff is the holder or owner of the note; that it does not appear, and is not stated or averred, that the same or any part thereof remains unpaid; and that it is not stated that any sum is due or owing upon it, was frivolous. *Keteltas v. Myers*, 19 N. Y. (5 E. P. Smith) 231.

86. **In general.**—When a demurrer is general to a complaint, Courts are not bound to notice defects which are mere matter of form. *Phelps v. Owens*, 11 Cal. 22.

87. A demurrer admits the facts as alleged in the complaint. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

88. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer. *De Boom v. Priestly*, 1 Cal. 206.



89. When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the Court below. *Happe v. Stout*, 2 Cal. 460.

90. A defect which will defeat the plaintiff's present right to recover, in whole or in part, is a good ground of demurrer. *Hentsch v. Porter*, 10 Cal. 555.

91. An objection that securities sued on are not promissory notes must be taken advantage of on demurrer, and a demurrer having been filed without pointing out this defect, it must be considered waived. *Powell v. Russ*, 4 Cal. 197.

92. There are six causes for which a demurrer may be interposed, under section forty of the Code, and unless a ground of demurrer be included under one or more of such causes, it cannot be sustained. *Hentsch v. Porter*, 10 Cal. 555.

93. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objection to it should be taken by demurrer. *Greenfield v. Steamer Grinnell*, 6 Cal. 67.

94. Where the defendants serve a pleading containing matter in answer, and matter in demurrer to the complaint, they should be compelled to elect between the two. *Struver v. The Ocean Insurance Co.*, 16 How. 422.

95. When the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true. A demurrer to an answer, that defendant is civilly dead, does not admit the death: for civil death is a fiction which is contradicted by the very fact that defendant has answered. *Freeman v. Frank*, 10 Abbott's Pr. 370.

96. Where a demurrer is interposed which the pleader could not have supposed would dispose of the case on its merits, it cannot be deemed to have been put in in good faith. *Osgood v. Whittlesey*, 10 Abbott's Pr. 134.

97. A demurrer to any pleading admits the facts stated in it for the purposes of the entire case. After the decision thereon, the party may, by the special permission of the Court, withdraw his demurrer and take issue upon the facts. But while the demurrer remains upon the record, the facts admitted by it cannot be controverted so far—that is, as the particular series of pleadings is concerned which terminate in the demurrer. If there are other issues involving the same facts, they are not affected by the demurrer. Accordingly, where to a defense of the Statute of Limitations, the plaintiff replied successive absences of the defendant from the State, and defendant's demurrer to it was overruled, with liberty to withdraw it upon terms, but he went to trial without complying with those terms: *Held*, that the reply was admitted, and no evidence was required of the facts therein stated. *Culler v. Wright*, 22 N. Y. (8 Smith) 472.

98. A demurrer which specifies various grounds of objection to the sufficiency of the allegations of the complaint, without stating any one of the grounds specified in section one hundred and forty-four of the Code, is insufficient. *Harper v. Chamberlain*, 11 Abbott's Pr. 234.

#### § 41. Demurrer must specify grounds of objection.

The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded.

N. Y. Code, § 145.

1. Where a bill alleges a parol trust, it seems that it must be denied; and a general demurrer will not lie. *Peralta v. Castro*, 6 Cal. 354.

#### § 42. Demurrer and answer.

The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue; or may demur and answer at the same time.

N. Y. Code, § 151.

1. The defendant cannot demur to part and answer another part of a complaint which contains but one cause of action, stated in one count. In other words, a defendant cannot demur to part of a cause of action. *Ingraham v. Baldwin*, 12 Barb. 9.

2. After an extension of time to answer, the defendant may put in a demurrer, instead of answering. *Brodhead v. Brodhead*, 3 Code R. 8.

§ 43. *Amended complaint, how filed and served.*

[1854, 1855.] If the complaint be amended, a copy of the amendments shall be filed, or the Court may in its discretion require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the Court, and judgment by default may be entered upon failure to answer, as in other cases.

§ 44. *Objection not appearing on complaint.*

When any of the matters enumerated in section forty do not appear upon the face of the complaint, the objection may be taken by answer.

N. Y. Code, § 147.

§ 45. *Objections, when deemed waived.*

If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

N. Y. Code, § 148.

§ 46. *Answer, what to contain.*

[1854, 1860, 1862.] The answer of the defendant shall con-

tain; first. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations; second. A general denial shall only put in issue material and express allegations of the complaint.

third. A statement of any new matter or counter claim, constituting a defense, in ordinary and concise language.

N. Y. Code, § 149.

1. **General denials.**—In a case of malicious prosecution, where the defendants filed a general denial, and also averred that they had nothing to do with the prosecution, except as witnesses. Plaintiff filed a replication, taking issue on this averment: *Held*, that if plaintiff chose to consider this a good defense, and join issue on it, defendants cannot complain: though, probably, this matter was put in issue by the general denial, and the replication was unnecessary. *Dreux v. Domec*, 18 Cal. 83.

2. Where, in an action by a landlord against his tenant, the complaint verified alleges a demand in writing, and the answer verified, instead of specifically denying the allegation, denies generally "each and every allegation" in the complaint: *Held*, that this general denial puts plaintiff on proof of demand, and of everything necessary to maintain the action. *Sullivan v. Cary*, 17 Cal. 80.

3. Under the system of practice in this State, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title. *White v. Moers*, 11 Cal. 69.

4. An answer which denies generally all the allegations of the complaint is equivalent to the general issue at common law, and ought not to be struck out as sham or frivolous. *Brooks v. Chilton*, 6 Cal. 640.

5. In equity, the general denials made by traversing literally and conjunctively the statements of a sworn bill are not legitimate for the purpose of putting in issue specific allegations; for, in this way, a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge, or even the substantial fact. *Blankman v. Vallejo*, 15 Cal. 638.

6. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, the defendant may show anything disproving the contract as averred, as that another party, who in fact sold the cattle, sold them as his own, and not as the agent of plaintiff, or that defendant was not to pay until the cattle were fattened and slaughtered. *Hawkins v. Borland*, 14 Cal. 413.

7. Under a plea of the general issue, evidence of a counter claim is not admissible, but should be especially pleaded. *Hicks v. Green*, 9 Cal. 74.

8. Where a complaint is verified, an answer denying "generally and specifically each and every material allegation to the complaint, the same as if such allegation were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Hensley v. Tartar*, 14 Cal. 508.

9. The legal effect of general denials, as in this case, is not changed by expressions showing that they were intended to be specific. *Id.*

10. *Query*: Whether this rule does not also apply to pleadings not verified. *Id.*

11. That the overflow or leakage was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case. *Jackson v. Feather River Water Co.*, 14 Cal. 18.

12. The complaint expressly averred that the plaintiff fell into the ditch, and that he fell into it in consequence of defendants' negligence in omitting to place any guard against accident. The answer denied that the ditch was left unguarded "so that persons using reasonable care" would fall into it. It then proceeded with a further denial, "that the plaintiff, without any fault or want of care on his part, did fall therein." *Held*, a "general denial" of the plaintiff's allegation of his having fallen into the ditch in the manner described, so that that allegation in all its parts, "for the purposes of the action," must be deemed to have been "controverted," and the plaintiff must prove that he fell into the ditch. Evidence that he was found near it with his leg broken was not sufficient. *Well v. The Buffalo Water Works Co.*, 4 E. P. Smith's (18 N. Y.) R. 119.

13. Under the general denial authorized by the Code, evidence of a distinct affirmative defense is not admissible. Under such a defense, the defendant is limited to a contradiction of the plaintiff's proof, and to the disproval of the case made by him. *Beatty v. Swarthout*, 32 Barb. 293.

14. Of the analogy between a general denial under the Code and the general issue. *McKyring v. Bull*, 2 E. P. Smith's (16 N. Y.) R. 297.

15. **Specific denials.**—The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require

a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. *Blankman v. Vallejo*, 15 Cal. 638.

16. To a complaint sworn to, on a promissory note payable in a sum certain, "in monthly *pro rata* installments, out of the first net proceeds from sale of water," and an allegation that defendants turned off the water from the ditch, the proceeds of the sales of which water were to be applied to the payment of the note, and thereby diminish the quantity, etc. The defendant answered by admitting the making of the note, but denied, to the best of his knowledge, information, and belief, all and singular, the other allegations in said complaint: *Held*, that such answer did not amount to a specific denial of the allegations of the complaint. *Stewart v. Street & Co.*, 10 Cal. 372.

17. The want of capacity in the plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. *California Steam Navigation Co. v. Wright*, 8 Cal. 585.

18. Per Burnett, J.—A specific denial to each allegation of a complaint is a separate denial, applicable only to the particular allegation controverted. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

19. The object of the Code was to narrow the proof upon the trial, and to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation. *Id.*

20. **What must be specifically pleaded.**—In an action for damages, for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in a third party. Such a defense should have been specially pleaded, and the third party made a party to the action. *Humphries v. McCall*, 9 Cal. 59.

21. In an action against a Sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a Sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 156.

22. Under a plea of the general issue, evidence of a counter claim is not admissible, but should be especially pleaded. *Hicks v. Green*, 9 Cal. 74.

23. In an action brought to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to insist, at the trial, that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer. *Kendall v. Vallejo*, 1 Cal. 371.

24. The want of capacity in a plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. *California Steam Navigation Co. v. Wright*, 8 Cal. 585.

25. In an action upon a stated account, evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting. *Terry v. Sickles*, 13 Cal. 427.

26. *Query*: Whether such evidence would be admissible under a general denial if the pleadings were not verified. *Id.*

27. In an action for taking and converting goods, the answer contained a general denial, and, as a second defense, a justification under an execution against third parties: *Held*, that evidence of a levy under an execution prior to that stated in the answer was not admissible. If defendant had made such a prior levy, and was thereby entitled to the possession of the goods, it was matter to be specifically pleaded. *Graham v. Harrower*, 18 How. Pr. 144.

28. Where a consideration is not implied, or a request is essential to the defendant's liability, it must be specially averred in pleading. *Spear v. Downing*, 12 Abbott's Pr. 437.

29. Where the disability of the plaintiff, who is a married woman, does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense to the action, should set it up in his answer. By a mere general denial he waives it. *Dillage v. Parks*, 31 Barb. 132.

30. **Denials on information and belief.**—The denial as to value, being based on the want of knowledge or information, is insufficient. *Kuhland v. Sedgwick*, 17 Cal. 123.

31. A specific allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same, and no evidence of the contract would be necessary. *Ord v. Steamer Uncle Sam*, 13 Cal. 369.

32. The allegation of the death of plaintiff's ancestor, in a verified complaint, is not sufficiently controverted by the averment in the answer "that defendant has not sufficient knowledge to form a belief," and therefore neither admits nor denies. *Anderson v. Parker*, 6 Cal. 197.

33. Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presumptively based on information, he is not bound to deny positively, but only "according to his information and belief;" but in such case, he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information. *Humphreys v. McCall*, 9 Cal. 59.

34. Defendant can know what is his belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony. *Id.*

35. The answer that the defendant, a municipal corporation, has no knowledge or information "in respect to the obligations of a count in a verified complaint, and therefore denies the same," is insufficient. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

36. The statute imposes upon the defendant, if a natural person, and if a corporation, upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matter alleged in a verified complaint, to enable them to answer in the proper form. *Id.*

37. In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Curtis v. Richards & Vantine*, 9 Cal. 33.

38. A denial upon information and belief is no traverse. The defendant must aver that he has no information or knowledge sufficient to form a belief. *Therason v. McSpedon*, 2 Hill, 1.

39. **Insufficient denials.**—Where a complaint, in an action on a promissory note, executed by two defendants, averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: *Held*, that the averment of partnership was immaterial, and that plaintiff was entitled to judgment on the pleadings. *Whitewall v. Thomas*, 9 Cal. 499.

40. A plea, professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our system. *Wallace v. Bear River Water & Mining Co.*, 18 Cal. 461.

41. Suit on a promissory note made by defendants. The complaint, not verified, sets out the note, and avers assignment thereof by payee to plaintiff. Answer, general denial: *Held*, that the answer does not admit, but denies the assignment, and hence, plaintiff must prove it, and is not entitled to judgment on the pleadings. *Hastings v. Dollarkhide*, 18 Cal. 390.

42. Where the complaint, verified, avers that defendant is indebted to plaintiff for goods, wares and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that defendant is indebted in the sum of eight hundred and twenty-eight dollars, sixteen cents, as is set out in said complaint: *Held*, that the denial is insufficient. *Higgins v. Hertell*, 18 Cal. 330.

43. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Castro v. Wetmore*, 16 Cal. 379.

44. Where, in an action on a lost note, the complaint, verified, alleges the loss,

stating particularly the circumstances thereof, an answer denying that the note was lost as alleged, does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Id.*

45. In a suit on a note, the complaint containing the note, or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

46. Where a complaint is verified, an answer denying "generally and specifically each and every material allegation in the complaint, the same as if such allegation were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Hensley v. Tartar*, 14 Cal. 508.

47. An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendant wrongfully and unlawfully entered and dispossessed plaintiff," because such denial admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 91.

48. The denial of any indebtedness, without a denial of any of the facts from which that indebtedness follows as a conclusion of law, raises no issue. *Curtis v. Richards & Vantine*, 9 Cal. 33.

49. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz: "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia Ditch to them, plaintiffs, as alleged," etc. *Humphreys v. McCall*, 9 Cal. 59.

50. Insufficient answer of failure of consideration, in an action on a note given for a subscription. *Palmer v. Smedley*, 18 How. Pr. 321.

51. An answer that defendant "says that he denies," is insufficient as a denial, and might be stricken out, on motion, under section one hundred and fifty-two of the Code. *Blake v. Eldred*, 18 How. Pr. 240.

52. An allegation, in answer, that the defendant "does not know, of his information or otherwise, that the plaintiff had commenced the action in the complaint mentioned," is not a denial. *Sayre v. Cushing*, 7 Abb. R. 371.

53. In an action for services, a denial that the plaintiff rendered the services "on the days, and at the times, and to the extent or quantity, or in the manner mentioned in the complaint," is no denial of anything certain. *Davison v. Powell*, 16 How. Pr. R. 467.

54. In an action for an assault, the defendant's answer admitted an assault, but denied that it was of the nature or extent stated in the complaint: *Held*, that there was no issue to be tried, and that the plaintiff was entitled to an assessment of damages. *Schnaderback v. Worth*, 8 Abb. R. 37.

**55. Literal and conjunctive denials.**—In this case, as the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure *this bond*—the denials in the answer being literal and conjunctive—the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. *Blankman v. Vallejo*, 15 Cal. 638.

56. An allegation, in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiff, because such denial admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 91.

57. Where the answer denied the allegations of indebtedness as to time, amount and work, in the very words of the complaint: *Held*, that the answer raised an immaterial issue upon these particulars, instead of meeting the substantial matter averred. *Caulfield v. Sanders*, 17 Cal. 569.

58. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. *Smith v. Richmond*, 15 Cal. 501.

59. Where the complaint, in replevin, averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was \$1,000; and the answer denied that on the day specified "the plaintiff was the owner and

lawfully in possession;" and, as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth \$1,000: *Held*, that the answer is insufficient, because it raises an immaterial issue as to time; and, as to the possession of the property, that it amounts merely to a conclusion of law. *Kuhland v. Sedgwick*, 17 Cal. 123.

60. Such an answer raises no issue as to the allegation of "possession," except in conjunction with the allegation of ownership, and as each of the allegations is sufficient to sustain the complaint, the issue presented by the conjunctive denial is irrelevant and immaterial. *Id.*

61. A defense which is inartificially drawn, and commingles denials and new matter, is not, for that reason, to be held bad on demurrer, if, by a liberal construction, its allegations constitute a defense. *Rice v. O'Connor*, 10 Abb. Pr. R. 362.

62. **Frivolous and insufficient defenses.**—It is no defense to a note, given by one partner to the other for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note. *Cass v. Macey*, 6 Cal. 276.

63. When such a defense was set up in the answer, in an action on the note: *Held*, that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out. *Id.*

64. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant, in his answer, denies that the plaintiff was the lawful owner, or that he had any title to the land: *Held*, that to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that failing in this, his defense to the action was defective. *Thayer v. White*, 3 Cal. 228.

65. In an action for the purchase money of land conveyed by deed, without covenants, want of title in the vendor is no defense, unless the vendee has been evicted. *Fowler v. Smith*, 2 Cal. 39.

66. The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered in the breaking of defendants' dam. *Fraser v. Sears Union Water Co.*, 12 Cal. 555.

67. In an action against one only of several persons jointly liable, the answer set up the nonjoinder of the others as a defense, but omitted to allege that they were still living; but proof that they were still living was given on the trial, without objection: *Held*, that the defect in the answer was cured. Such an objection should be disregarded, or the answer amended to conform to the proof. *Wooster v. Chamberlin*, 23 Barb. 602.

68. **Alternative and hypothetical allegations.**—The answer further alleged, that if any such certificate of deposit, as in the complaint is alleged, was ever issued, that the same has been paid: *Held*, that this was not irrelevant. Hypothetical pleading is improper, but under the peculiar circumstances of the case, as payment could not be directly alleged, it might be stated in this way. *Doran v. Dinsmore*, 20 How. Pr. 503.

69. **Separate defenses.**—Each defense separately stated as a separate defense must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer. The former rule in this respect is not relaxed by the Code. *Xenia Branch Bank v. Lee*, 7 Abb. R. 372.

70. A defense claiming to be separately stated, but not complete in itself, and only to be made complete and sufficient by resorting to portions of other defenses contained in the same answer, is insufficient, and bad on demurrer. *Id.*

71. It seems that it might be otherwise, where, for the purpose of avoiding repetition of facts alike applicable to each of several defenses, the pleader should aver them in either one of his distinct and separate statements of a defense, &c., or by way of introduction to all, and thereafter in his subsequent separate statements, by distinct and intelligible reference, clearly include them in each. *Id.*

72. In an action to recover damages for breach of a contract, the fact that the

contract is void by the Statute of Frauds—*e. g.*, for not being in writing—need not be pleaded in order to avail the defendant. *Amburger v. Marvin*, 4 E. D. Smith's C. P. R. 393.

73. In an action, in the nature of an action on the case, against the Sheriff for an escape—since by 2 Rev. Stat. 437, § 61, the plaintiff can only recover actual damages—defendant is at liberty to plead and prove that, at the time of the escape, the prisoner was wholly destitute of property, and this, though constituting only a partial defense, may be pleaded as a separate defense. (16 N. Y. 297); *Loosey v. Orser*, 4 Bosw. 391.

74. By including a defense upon the merits in the same answer with the defense of a former suit pending for the same cause of action, the defendant does not waive the latter defense. The Code provides for but a single answer, in which the defendant is required to include every defense upon which he relies to defeat the action. (4 Kern. 465); *Gardner v. Clark*, 21 N. Y. (7 Smith) 399, overruling a previous decision in the same case. 6 How. Pr. 449.

75. Each defense in an answer, which, by the very words of such defense, is declared to be "a further, separate and distinct defense," must be complete in itself, and must contain all that is necessary to answer. (7 Abbott's Pr. 373; S. C., 2 Bosw. 694.) It cannot be made good by a resort to other distinct parts of the answer to which such defense contains no reference, either in terms or by necessary and just construction. *Loosey v. Orser*, 4 Bosw. 391.

76. **New matter.**—New matter is, where defendant seeks to introduce into the case a defense not disclosed by the pleadings—something relied on by him, but not put in issue by the plaintiff. *Bridges v. Paige*, 13 Cal. 640.

77. Where the pleadings are verified, every matter of defense, not directly responsive in the allegations of that complaint, must be set up in the answer. *Terry v. Sickles*, 13 Cal. 427.

78. Suit by an attorney on a *quantum valebant*, for professional services: *Held*, that negligence and want of skill need not be set up in the answer. *Bridges v. Paige*, 13 Cal. 640.

79. New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. *Piercy v. Sabin*, 10 Cal. 22.

80. Where new matter exists, it must be stated in the answer. *Id.*

81. The Code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer. *Id.*

82. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. *Id.*

83. The general denial only puts in issue the allegations of the complaint. New matter must be specially pleaded, and new matter is that which the defendant must affirmatively establish. *Glazer v. Clift*, 10 Cal. 303.

84. **Plea in bar.**—The judgment of a Court of competent jurisdiction directly upon the point is, as a plea, a bar, and as evidence, conclusive between the same parties, upon the same matter directly, in another Court. *Love v. Waltz*, 7 Cal. 250.

85. Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwill*, 9 Cal. 477.

86. When a defendant pleads another suit pending between the same parties, and for the same cause of action, and it appears that no summons was ever issued upon the complaint, and that there was no voluntary appearance on the part of the defendant in such suit: *Held*, that there was no suit pending. *Weaver v. Conger*, 10 Cal. 233.

87. To plead a former judgment in bar, it must appear not only that it was upon the same cause of action, but between the same parties. *Uhlfelder v. Levy*, 9 Cal. 607.

88. Wherever the subject matter of the plea or defense is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter



which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Hentsch v. Porter*, 10 Cal. 555.

89. An action brought by an agent, in his own name, for a trespass, in taking and converting coin for the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 140.

90. A plea of a former suit pending is no bar to an action, where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. *Reynolds v. Harris*, 9 Cal. 338.

91. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover the value. Defendants plead the former recovery as a bar: *Held*, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not having been satisfied. *Nickerson v. California Stage Co.*, 10 Cal. 520.

92. In an action on a joint contract, the omission of the plaintiff to sue all the joint contractors is a complete defense to the action, and may be set up in bar of the action, and is to be treated like any other valid defense. *Leavitt v. Tuttle*, 4 Kern. 465. So held, in an action against an attorney, to whom money was paid as one of a partnership composed of several attorneys. *Wooder v. Chamberlin*, 28 Barb. 602.

93. **Plea in abatement.**—A failure to join may be pleaded in abatement. *Whitney v. Stark*, 8 Cal. 514.

94. The nonpresentation of the claim to the administrator is, in its nature and effect, nothing more than a matter of abatement. It defeats only the plaintiff's present right to recover, and such an objection to the complaint must be made for the first time in the Court below. *Hentsch v. Porter*, 10 Cal. 555.

95. To support a plea in abatement, founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Primm v. Gray*, 10 Cal. 522.

96. Want of authority in the attorney of record to institute a suit cannot be pleaded in abatement. The proper course, if the suit were not authorized, is for defendant to move the Court upon affidavits to dismiss the suit, upon the ground that it was not authorized by the person in whose name it is brought. If the attorney, on such motion, and after notice of it, fails to show his authority, the Court can dismiss the case. *Turner v. Caruthers*, 17 Cal. 431.

97. Where, on a plea in abatement to the entire action, that another suit, for the same cause of action, was pending at the time of suit brought, the proof shows that the first suit is only for part of the same matter sued for in the second suit, the plea fails. *Thompson v. Lyon*, 14 Cal. 39.

98. Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 310.

99. Matter in abatement, or which was such at common law—as the motion in this case—must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. *Toombs v. Randall*, 3 Cal. 438.

100. Wherever the subject matter of the plea or defense is, that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should, in general, be pleaded in abatement. *Hentsch v. Porter*, 10 Cal. 555.

101. Pleas in abatement are not favored, and the party pleading must prove his plea as put. *Thompson v. Lyon*, 14 Cal. 39.

102. Though civil death abates an action for personal tort, an answer setting up that defendant is civilly dead is inconsistent, for the fact that defendant has put in the answer proves that he is alive; the answer, therefore, is bad on demurrer. *Freeman v. Frank*, ante, 370.

103. **Plea in justification.**—If, in justification by the Sheriff under an

attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the Sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Walker v. Woods*, 15 Cal. 66.

104. An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint. *Glazer v. Clift*, 10 Cal. 303.

105. In an action brought against a Sheriff for property attached by him, he may plead the property to have been in possession of the defendant in the suit. In such a case, it is not necessary that the defendant should specially plead want of notice and demand in order to make such a defense. *Killey v. Scannell*, 12 Cal. 73.

106. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: first, that the land is public land; second, that it contains mines or minerals; third, that he enters for the *bona fide* purpose of mining: and such justification must be affirmatively pleaded in the answer, with all the requisite averments to show a right, under the statute or by law, to enter. *Lentz v. Victor*, 17 Cal. 271.

107. **Plea of forfeiture.**—In an action of ejectment to recover mining claims, an answer to the complaint which avers that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry, is insufficient, in not setting forth the rules, customs, etc. *Dutch Flat Co. v. Mooney*, 12 Cal. 534.

108. The facts should be stated so as to enable the Court to determine whether the forfeiture did accrue. The averment of forfeiture is a legal conclusion, upon which no issue can be taken. *Id.*

109. **Defense occurring pending the action.**—Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *puis darrein continuance*. *Jessup v. King*, 4 Cal. 331.

110. The fact that, after the commencement of the action, the debt to recover which it was brought was attached in the hands of the defendant by creditors of the plaintiff, by proceedings in another State, and that such proceedings having been regularly conducted to judgment, the defendant paid over the fund therein, is a complete defense. *Donovan v. Hunt*, 7 Abbott's Pr. 29.

111. On allowing a defendant to put in a supplemental answer, in the matter of a plea *puis darrein continuance*, the Court may, in their discretion, make it a condition that defendant waive other defenses; and this should be done where the sufficiency and equity of the proposed defense is doubtful. *Bate v. Fellowes*, 4 Bosw. 638.

112. **Answer must be consistent.**—Where an amended answer is complete in itself, and is inconsistent with the original answer, the two cannot stand together. *Kuhland v. Sedgwick*, 17 Cal. 123.

113. A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next. *Hensley v. Tartar*, 14 Cal. 508.

114. Though an answer which first denies all the allegations in the complaint, and then in subsequent paragraphs admits certain of the averments, does not leave it doubtful what allegations are put in issue, yet in such case the general denial will be stricken out, on motion, unless the defendant amends, by so modifying the general denial that it shall not deny allegations afterwards in the answer admitted. *Willet v. Metropolitan Ins. Co.*, 2 Bosw. 678; 9 Abbott's Pr. R. 444.

115. **What filing an answer waives.**—The answer of the defendant waives the alleged error as to the change of parties, whereby the name of such defendant has been substituted for that of another, without notice. *Smith v. Curtis*, 7 Cal. 584.

116. An answer is a waiver of a demurrer previously interposed. *Pierce v. Minturn*, 1 Cal. 470.

117. An answer to a complaint, after demurrer, overrules the demurrer. *Brooks v. Minturn*, 1 Cal. 481.

118. Where a demurrer to the complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer. *DeBoom v. Priestly*, 1 Cal. 206.

119. **Admission of facts in complaint, when and when not.**—The failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader. *Burke v. Table Mountain Co.*, 12 Cal. 403.

120. Under our practice, and that of the common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded. *De Ro v. Cordes*, 4 Cal. 117.

121. An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer. *Taylor v. Randall*, 5 Cal. 79.

122. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Blankman v. Vallejo*, 15 Cal. 638.

123. Where the admissions in an answer negative its general denials, the latter may be disregarded and judgment asked upon the former, where the complaint is verified, and the answer consists of such admissions and denials. *Fremont v. Seals*, 18 Cal. 433.

124. When the action is upon an account, and defendant in his answer avers, in the form of reasons for refusing payment when the account was presented to him before suit, that the principal portion was composed of items for printing done for clients, for which he never became personally bound, and that the portion for which he was personally liable, "has, to the best of his knowledge and belief," been paid and satisfied, and therefore he pleads payment of the same: *Held*, that this is in substance a denial of indebtedness for a portion of the account, and a plea of payment for the balance; and that it is in effect an admission as to that balance of an original liability, and throws the burden of establishing payment upon the defendant, *Caulfield v. Sanders*, 17 Cal. 569.

125. The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiffs, will throw the *onus* on defendant in proving his affirmative allegations. *Thompson v. Lee*, 8 Cal. 275.

126. A complaint alleged that the plaintiff and defendant were jointly interested in two contracts with a railroad company, on which the company owed them \$12,000, for his share of which the plaintiff prayed an accounting and judgment. The answer denied that the plaintiff had any interest in one of these contracts, but was silent as to the indebtedness: *Held*, that it was not thereby admitted that the \$12,000 was due on the other contract in which the plaintiff had an interest. *Williams v. Hayes*, 20 N. Y. (6 Smith) 58.

127. **Misjoinder of parties.**—Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313.

128. **Nonjoinder of parties.**—There are two ways of taking advantage of nonjoinder of parties plaintiff in an action of trover, or apportionment of damages, when the defect does not appear upon the face of the complaint; and these are, at law, either by answer at the trial; and in equity, by answer or demurrer. *Whitney v. Stark*, 8 Cal. 516.

129. **Misjoinder of actions.**—If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Macondray v. Simmons*, 1 Cal. 395.

130. **Not to be evidence.**—An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 168.

131. The equity rule requiring two witnesses to controvert an answer under oath, does not prevail in this State. The answer is only a pleading, and is not evidence for defendant. *Bostic v. Love*, 16 Cal. 69; *Blankman v. Vallejo*, 15 Cal. 638.

132. **Prayer.**—In an action to recover personal property, to enable the de-

defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments. *Gould v. Scannell*, 13 Cal. 430.

### ANSWER IN SPECIAL CASES.

133. **Bankruptcy.**—The answer to a suit on a note, set up defendant's discharge in insolvency. Plaintiff demurred to the answer on the ground that it did not allege that the note was described, set forth or included in defendant's schedule: *Held*, that the demurrer was not well taken; that under section fifty-nine of the Practice Act, it was sufficient to allege in the answer that a judgment had been duly rendered discharging defendant from the demand sued on; and that whether the demand were sufficiently described was matter of evidence, to be determined at the trial by inspection of the record. *Hanscom v. Tower*, 17 Cal. 518.

134. **Bills of exchange and promissory notes.**—The failure to make presentment at the place named would not discharge the debt, but could only be pleaded in defense as to the question of costs and damages. *Montgomery v. Tutt*, 11 Cal. 307.

135. It is no objection to recovery on a bill that, by special indorsement on it, title is shown out of the payee, without any retransfer from the last indorser to him, if there be proof that the indorsement was made simply for collecting the bill, and that the indorsees had no interest in it. *Naglee v. Lyman*, 14 Cal. 450.

136. A copy of the note sued on being attached to, and made a part of, the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Horn v. Volcano Water Company*, 13 Cal. 62.

137. An answer to a suit on a promissory note by the assignee, which sets up as one defense: first, that the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order;" second, that the defendant paid the note before assignment; third, note was assigned to plaintiff after maturity, etc.: *Held*, not fatally defective. *Sherman v. Rollberg*, 11 Cal. 38.

138. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 21.

139. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

140. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Castro v. Wetmore*, 16 Cal. 379.

141. Where, in an action on a lost note, the complaint, verified, alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Id.*

142. Suit on a promissory note made by defendants. The complaint, not verified, set out the note, and avers assignment thereof by payee to plaintiff. Answer, general denial: *Held*, that the answer does not admit, but denies the assignment, and hence, the plaintiff must prove it, and is not entitled to judgment on the pleadings. *Hastings v. Dollarhide*, 18 Cal. 390.

143. In defense to an action on a promissory note, it is not sufficient to plead, in general terms, want of consideration, and that the note was obtained by fraud; the answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. *Gushee v. Leavitt*, 5 Cal. 160.

144. It is not a good plea to allege that a note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff. *Id.*

145. In an action on a promissory note by a special indorsee against the maker, the plaintiff must prove at the trial the genuineness of the indorsements, although the defendant has not denied their genuineness under oath. *Grogan v. Ruckde*, 1 Cal. 158—reconsidered and affirmed in *Id.* 193.

146. To an action against the maker of a promissory note, he answered that the plaintiff, with other creditors, signed a composition deed, agreeing to exchange the notes they held against the defendant for other extended notes to be drawn by him; and it appeared on the trial that the defendant called on the plaintiff, and offered him the new notes which the agreement provided for, but the plaintiff refused to receive them; but that he had not the new notes drawn at the time of the offer: *Held*, insufficient. To complete such defense, the party must plead and prove, not only tender of the new notes, but also aver a readiness at all times to perform his part of the agreement; and must bring the new notes thus tendered into Court on the trial. *Warburg v. Wilcox*, 7 Abb. R. 336.

147. That the plaintiff is not the owner and holder of the note in suit, may be proved under a general denial of a complaint which alleges that he is. *Hall v. Wheeler*, 7 Abb. R. 411.

148. An accommodation acceptor, who is liable merely as surety, and entitled by subrogation, may set up a demand for subrogation in his answer. *Bank of Toronto v. Hunter*, 4 Bosw. 646.

149. **Corporations.**—The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

150. There may exist the best reasons for a different rule of pleading when a municipal corporation is a defendant; but this Court can make no distinction, because the Code makes none. It is a matter for the Legislature, and not for the Court. *Id.*

151. **Divorce.**—The doctrine of recrimination, or *compensatio criminum*, applicable in suits for divorce, and the several offenses which, by the statute, constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Conant v. Conant*, 10 Cal. 249.

152. To be an absolute bar, the conduct of the plaintiff must be such as to constitute a proper basis for judicial decree against her, had suit been instituted by the defendant. *Id.*

153. In an application by the wife for a divorce, on the ground of the willful neglect of her husband, and his failure to provide her with the necessities of life, for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit. *Washburn v. Washburn*, 9 Cal. 475.

154. In an action for divorce, an answer setting up plaintiff's adultery as a defense need not allege the inhabitancy of the parties, or either of them. *Lesener v. Lesener*, 31 Barb. 330; 11 Abbott's Pr. R. 485.

155. **Ejectment.**—Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact, not in issue by the pleadings, but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 114.

156. The averments of possession and ouster, in this case, were held to be insufficiently denied. See statement of facts. *Smith v. Doe*, 15 Cal. 100.

157. A defendant in ejectment, entering under a deed executed by order of a Court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set out an outstanding title in a third person. *Gregory v. Haynes*, 13 Cal. 291.

158. In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had the possession," etc.

This denial might be true, and yet the defendant be in possession. The defendant was called on to answer, not only the character of the possession, but the fact of possession. *Burke v. Table Mountain Co.*, 12 Cal. 403.

159. Where plaintiff had possession under a deed, duly recorded, and the defendant having entered with notice of and in subordination to plaintiff's title, cannot be permitted to deny it in an action of ejectment. *Stephens v. Mansfield*, 11 Cal. 363.

160. The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the Court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the Court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial. *Arquello v. Edinger*, 10 Cal. 150.

161. In an action of ejectment to recover the possession of land, where the defendant simply denied the allegation of the complaint: *Held*, that he could not introduce in evidence a copy of the record of a former recovery. *Piercy v. Sabin*, 10 Cal. 22.

162. Under our system of practice, equitable defenses may be interposed to the action of ejectment, but the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the Court into a legal right to the premises, or such as will stop the plaintiff in the prosecution of the action. *Lestrade v. Barth*, 19 Cal. 660.

163. **Foreclosure.**—Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object afterward that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 600.

164. In a foreclosure suit on a note and mortgage of the homestead executed by husband and wife, the wife alone answered, but did not verify her answer. On suit brought to vacate the decree rendered in the foreclosure suit, the wife having been served with process, cannot complain that her answer was not verified. And her failure, by excusable negligence, to make defense to the foreclosure, is no ground to vacate the decree, if it be shown that in fact she had no defense. *Pfeiffer v. Riehn*, 13 Cal. 643.

165. Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant on the understanding that if the money was repaid in six months, with interest, plaintiff was to reconvey, and does specifically deny that the money was loaned: *Held*, that it virtually admitted the loan. *Lee v. Evans*, 8 Cal. 424.

166. The allegation in the answer, that unless the money was returned the property should remain in the plaintiff, does not change the nature of the contract. This is the usual form of a mortgage. *Id.*

167. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Blankman v. Vallejo*, 15 Cal. 638.

168. **Fraud.**—A case where it was held the answer sufficiently presented the question of fraud. *Lamotte v. Butler*, 18 Cal. 32.

169. A plaintiff's recovery cannot be barred by the Statute of Frauds, unless the statute be pleaded. *Osborne v. Endicott*, 6 Cal. 149.

170. Suit on note for the purchase of land. Answer set up that the note was given for the land, fencing and building materials; that plaintiff falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: *Held*, that defendant, having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to fences, they being, in this case, part of the freehold. *Held*, further, that a special

demurrer being put in to the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber, contracted for, and not delivered, and this at the time of contracting. *Kinney v. Osborne*, 14 Cal. 112.

171. The answer is also fatally defective, in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity of lumber. *Id.*

172. The mere fact that a vendor of land was aware of the existence of a judgment, which was an incumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to suit on a note for the purchase money, where the means of information—to wit, the county records—were equally accessible to both parties. In such case, if the vendee neglected to inform himself, he is guilty of negligence, and cannot set up his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been misled. *Ward v. Packard*, 18 Cal. 391.

173. **Rent.**—Where the answer of the defendant, on a claim for rent in arrear, “denies that he is indebted to said plaintiff in manner and form as said plaintiff has above thereof complained against him,” it is substantially the plea of *nil debet* at common law, and under it the defendant may prove an eviction. *McLaren v. Spalding*, 2 Cal. 510.

174. An averment in a complaint for rent, that “the rent was, as it became due, duly demanded,” is put at issue by a denial, in the answer, of “each and every allegation in the complaint, wherein and whereby the defendant is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them.” *Academy of Music v. Hackett*, 2 Hilt. 217.

175. **Replevin.**—Where the complaint in replevin averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was \$1,000; and the answer denied that on the day specified the “plaintiff was the owner and lawfully in possession,” and as to its value, averred that the defendant has no knowledge, etc., and therefore denies that it is worth \$1,000: *Held*, that the answer is insufficient, because it raises an immaterial issue as to time; and as to the possession of the property, that it amounts merely to a conclusion of law. *Kuhland v. Sedgwick*, 17 Cal. 123.

176. **Statute of Limitations, how pleaded.**—To suit on an account, defendant averred that “each and every item of said account, prior to the tenth day of March, 1859, is barred by time; and he pleads and relies upon the statute of the State of California, entitled ‘An Act defining the time of commencing Civil Actions,’ approved April 22d, 1850, in bar of an averment of a conclusion of law.” *Held*, that a plea of the Statute of Limitations must aver the facts which bring the demand within the operation of the statute—as that the alleged cause of action has not accrued within certain designated years previous to filing the complaint. *Caulfield v. Sanders*, 17 Cal. 569.

177. Statutes of Limitation do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. *Nelson v. Nelson*, 6 Cal. 430.

178. When the plea of the statute is claimed as a mere legal right, it must be pleaded in the first instance, and has no day of grace thereafter. *Cook v. Spears*, 2 Cal. 409.

179. The Statute of Limitations regarded as a meritorious defense when invoked by executors and other persons entirely ignorant of the facts. *Tracy v. Suydam*, 30 Barb. 110.

180. **Trespass.**—In an action of trespass, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage. *Rowe v. Bradley*, 12 Cal. 226.

181. In an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of possession for the defendants to aver, in their answer, that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff. *McCormick v. Baily*, 10 Cal. 230.

182. **Undertakings and sealed instruments.**—The defect in the approval of a Sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval, is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law. *Alderson v. Bell and Wife*, 9 Cal. 315.

183. But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and, in a suit thereon, the plaintiff would be entitled to the full amount. *Swain v. Graves*, 8 Cal. 549.

184. The intent of the statute is fully carried out by excluding parol testimony to contradict a deed; but where parties admit the real facts of the transaction in their pleadings, these admissions are to be taken as modifications of the instrument. *Lee v. Evans*, 8 Cal. 424.

185. The law imports a consideration to a sealed instrument from its seal. At common law, a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this State has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer. *McCarty v. Beach*, 10 Cal. 461.

186. Where an answer contains an allegation of alteration in an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff. *Humphreys v. Crane*, 5 Cal. 173.

187. **Miscellaneous matters.**—The intention of the Code is to adopt the true and just rule, that the defendant must either deny the facts as alleged, or confess and avoid them. *Piercy v. Sabin*, 10 Cal. 22.

188. Under section forty-six of the Code, there are only two classes of defense allowed. The first consists of a simple denial; and the second, of the allegation of new affirmative matter. And as the Code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases. *Id.*

189. The defense, that the defendant acted by advice of counsel, must show that such advice was given upon a full and fair statement of the facts. *Bliss v. Wyman*, 7 Cal. 257.

190. When the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions, of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews & Hiller*, 9 Cal. 73.

191. An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief; the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system or practice, and cannot have any legal effect. *San Francisco Gas Co. v. The City*, 9 Cal. 453.

192. When a complaint alleges that the plaintiff was in quiet and peaceable possession of premises, and was dispossessed by the defendants, by force or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or confessing them, should state, distinctly and positively, new matter sufficient to avoid them. *Ladd v. Sterenson*, 1 Cal. 18.

193. It is irregular to entertain an *ex parte* motion to take the defendant's answer off the files, without proof that a copy of the affidavit on which the motion is founded, together with notice of the motion, has been served on the defendant's attorney a reasonable time before making the motion. *Stevens v. Ross*, 1 Cal. 94.

194. A defendant should set forth the true nature of his defense in his answer, and in case he does not, should not be permitted to insist upon it. *Walton v. Minburn*, 1 Cal. 362.

195. A plea professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our system. *Wallace v. Bear River W. and M. Co.*, 18 Cal. 461.



196. An answer filed without leave of Court after the time for answering has expired, but before default has been entered, is not a nullity; but at most, an irregularity. *Bowers v. Dickerson*, 18 Cal. 420.

197. In a verified answer, an evasion of the controlling fact in issue is a strong circumstance against the defendant. *Baker v. Baker*, 13 Cal. 87.

### § 47. Counter claim.

[1860.] The counter claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1st. A cause of action arising out of the transaction set forth in the complaint or answer, as the foundation of the plaintiff's claim, or defendant's defense, or connected with the subject of the action.

2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

N. Y. Code, § 150.

1. **Set-off at law.**—To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind and quality, and be clearly ascertained or liquidated; they must be certain and determined debts. *Naglee v. Palmer*, 7 Cal. 543.

2. **Set-off in equity.**—The mere existence of cross demands will not justify a set-off in a Court of chancery; there must be some peculiar circumstances, based upon equitable grounds, to warrant the Court in interfering. *Id.* 546.

3. A Court of equity upon bill filed, will compel an equitable set-off when the parties have mutual demands against each other, which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity. *Russel v. Conway*, 11 Cal. 93.

4. Equity will not set-off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Collins v. Butler*, 14 Cal. 227.

5. In an action by the owner of the equity of redemption to restrain the mortgagee's foreclosure and redeem the premises, the defendant cannot set up as a counter claim an agreement between the parties, by which the plaintiff had agreed to sell the premises to the defendant on certain conditions, and demand, as affirmative relief, specific performance thereof. Neither such contract, nor the cause of action upon it, arises in any respect out of the mortgage, or out of the proceedings of the defendant to foreclose it. It is a distinct transaction, and neither of the two causes of action has any dependence upon or arises out of the other. The Code, in allowing counter claim in actions of this character, has adopted substantially the rule in regard to filing cross bills in chancery. The cross bill could only relate to matter touching the matters in the original bill. (2 Barb. Ch. Pr. 127.) It could not embrace new and distinct matter not embraced in the original bill; and if it did, no decree could be founded upon such new matter. *Gallatin v. Erwin*, Hopkins, 48; 8 Cowen, 367; *Burns v. Nevins*, 27 Barb. 493.

6. **In actions on contracts.**—Plaintiff sues for balance due on a contract for erecting a building, and a small sum for extra work. Defendant seeks to offset a claim for two and one-third months' rent lost by him, because of the neglect of plaintiff to finish the building within the time specified in the contract, defendant

having at the date of the contract leased the building to responsible tenants, the lease to take effect from the time named in the contract for its completion: *Held*, that defendant cannot offset his rents, because the circumstances show that the contract was modified by the parties as to the time for the completion of the building. *McGinley v. Hardy*, 18 Cal. 115.

7. In an action arising on contract, the answer set up that before the commencement of the action the parties submitted the matters in controversy to arbitration under bonds, and that pending the hearing the plaintiff revoked the submission, and sought to recover the damages on the revocation as a counter claim: *Held*, that the counter claim was a proper one. Both demands were on contract, and existed at the commencement of the suit. (13 How. Pr. 249; 12 Id. 311; 16 Id. 244; 2 Kern. 156.) *Curtis v. Barnes*, 30 Barb. 225.

8. Where a negotiable promissory note, not yet due, is taken *bona fide* as collateral security for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the parties. *Payne v. Bensley*, 8 Cal. 260.

9. **Actions and counter claims sounding in tort.**—A demand for conversion of personal property cannot be made a counter claim in an action for rent. 4 E. D. Smith, 34; *McKensie v. Farrel*, 4 Bosw. 192.

10. When the complaint is for a conversion, a demand against the plaintiff on a cause of action not connected with the same transaction cannot be set up as a counter claim. The fact that the summons in the action is in a form suited to an action on contract, instead of an action for a wrong, does not qualify the nature of the action. *Chambers v. Lewis*, 11 Abbott, 210.

11. In an action in the nature of trover, by a plaintiff who has indorsed notes or bills of exchange, brought to recover the value thereof from a defendant, in whose possession they are, and who claims title thereto through the plaintiff's indorsement, it is competent for the defendant to set up title in himself, demand of payment, protest and notice, and ask by way of counter claim a judgment against the plaintiff as indorser. *Xenia Branch Bank v. Lee*, 7 Abbott, 372.

12. Where a counter claim is alleged in the answer as a tort, there can be no recovery upon it as upon contract. *Mayor, etc., of New York v. Parker Vein Steamship Co.*, 12 Abbott, 300.

13. Wrongful acts on the part of a landlord, not merely a breach of the contract of leasing, but wrongful independent of his obligations under that—e. g., injuries to the tenant's property on the premises, and to the possession, committed not under a claim of right—cannot be set up as a counter claim by the tenant in an action against him for the rent. *Edgerton v. Page*, 10 Abbott, 119.

14. In an action on a bond for rent upon a lease, the defendants cannot set up as a counter claim a demand against the plaintiff for removing from the demised premises fixtures placed there by the tenant, one of the defendants, but which the lease did not in terms give the right to place there or the privilege to remove. Such a demand does not arise out of the contract or transaction which is the foundation of the plaintiff's demand. *Mayor, etc., of New York v. Parker Vein Steamship Co.*, 12 Abbott, 300.

15. In an action against a jeweler for damages in using base metal in the manufacture for the plaintiff of articles for which the plaintiff furnished pure metal, the defendant is entitled to reconp from the value of the pure metal, and the sum paid him for his services, the value of the articles as manufactured, which were retained by the plaintiff. *Harris v. Bernard*, 4 E. D. Smith, 195.

16. In an action by the assignee of a partner against his copartners, for a balance due on a partnership accounting, the defendants cannot set up as a counter claim any injury caused to them by the fraud of the plaintiff's assignor, in a matter unconnected with the partnership affairs. Such a cause of action is not one existing against the plaintiff. *Boyd v. Foot*, 5 Bosw. 110.

17. A and B were common carriers. A between New York and Oswego, and B between Oswego and Cleveland. By agreement all through, business was divided between them in a fixed proportion. Some goods having been shipped for Cleveland in charge of A at New York, B received them at Oswego, paid A his share of the freight, and delivered them at Cleveland under a bill of lading charging them with the entire freight. The owner accepted them under this bill of lading, but refused to pay freight. In an action brought by B for the freight against the owner: *Held*, 1st, that B was entitled to the whole freight under the bill of

lading; 2d, that A need not be joined as a plaintiff; 3d, that a demand against A for injuries to other goods carried by him could not be set up as a counter claim in such action; 4th, that it might have been set up as such if A had been the plaintiff. *Merrick v. Gordon*, 20 N. Y. (6 Smith) 93.

18. That the pendency of an action for damages is no bar to the setting up of those damages as a counter claim in a suit afterwards brought against the plaintiff. 3 Sandf. 743; 15 How. 236; 6 Duer, 697; *Wiltzie v. Northam*, 3 Bosw. 162.

19. **Goods sold and delivered.**—In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense by way of recoupment to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl v. Bull*, 15 Cal. 425.

20. An accommodation indorser who, without consideration, becomes by indorsement a surety for the payment of the price of goods sold to the maker of the note, cannot set up as a defense or counter claim that the goods were warranted to the vendee, and that the warranty was broken. *Gillespie v. Torrance*, 7 Abbott, 462.

21. **Judgments.**—When judgments in different Courts are to be set off, the moving party must go into the Court in which the judgment against himself was recovered. *Russell v. Conway*, 11 Cal. 101.

22. Where two persons sue as partners in possession for a trespass on firm property, the judgment in their favor is firm assets, and the defendant in such case cannot afterwards, in equity, enjoin the collection of the judgment and set off against it a claim against one of the partners, on the ground that in fact this partner was the sole owner of the property, and alone entitled to the damages. The judgment is conclusive as to the joint ownership. *Collins v. Butler*, 14 Cal. 227.

23. Plaintiff recovered judgment against defendant for seizing, as Sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the judgment on which the execution issued, and moved the Court to set off this latter judgment against the former: *Held*, that the motion was properly denied; that defendant being sued as a wrongdoer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property; and that if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the Exemption Law. *Beckman v. Manlove*, 18 Cal. 388.

24. A Justice's judgment may be used as a counter claim in an action, although such action is brought in the same county, within five years after the rendition of the judgment. *Clark v. Story*, 29 Barb. 295.

25. **Lien as matter of defense.**—In an action for chattels, the defendant cannot set up as a counter claim a demand against the plaintiff, by virtue of which he claims a lien upon the chattels. The lien is matter of defense, but the defendant cannot have affirmative relief upon it in the action. *Gottler v. Babcock*, Abb. Pr. R. (note) 392.

26. In an action by receiver to reach things in action of the debtor held by the defendant, the answer denied the plaintiff's right thereto, because there were moneys due the defendant for which he held such assets as security: *Held*, that this did not constitute a counter claim, and the fact that the plaintiff did not reply to the answer, did not entitle the defendant to the allowance of the claims against the debtor which he had set up in the answer. *Tyler v. Whitney*, 12 Abb. Pr. R. 465.

27. In an action to recover possession of a pension certificate issued to the plaintiff, it is no defense, either legal or equitable, that the plaintiff left such certificate with the defendants as security for goods thereafter sold and delivered by them to him, relying on such security, and that there is a balance due to them for such goods. Such facts do not create a lien in defendants' favor upon the certificate, nor constitute a right to any relief in the action, and therefore do not constitute a defense or counter claim as defined by the Code. *Moffat v. Van Doren*, 4 Bosw. 609.

28. In an action to recover possession of personal property delivered to defendant under a contract, defendant may set up, as a counter claim, a lien arising in his favor by virtue of the same contract. There is no reason why, in an action for the possession of personal property, all the claims of either party against the other,

arising out of the transaction set forth in the complaint, may not be determined, as well as in an action technically on contract. *Brown v. Buckingham*, 11 Abb. Pr. R. 387.

29. **Joint and several claims.**—A joint claim by two persons cannot be pleaded as a counter claim by one defendant, but he may amend, and allege that the whole interest therein had been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

30. Demands being joint and several, are not, strictly speaking, due in the same right, yet if the legal and equitable liabilities on claims of money become vested in or may be urged against one, they may be set off against separate demands, and vice versa. *Russell v. Conway*, 11 Cal. 101.

31. A set-off cannot be pleaded by one of several defendants sued on joint liability. *Collins v. Butler*, 14 Cal. 223.

32. **An assignee cannot set up counter claim, when.**—That a counter claim cannot be set up in an action by an assignee, when it shows a cause of action against the assignor only. (4 Duer, 385; 3 Kern. 248; 2 Duer, 639; 3 Sandf. 743; 15 How. Pr. 236; 6 Duer, 697.) *Wilstie v. Northam*, 3 Bosw. 162.

33. **Suit by Assignee, defense to.**—Any matter may be set off in an action brought by an assignee for the benefit of creditors, which might have been set off had the action been brought by the assignor. The assignee is not, *à bona fide* purchaser. (Disapproving of 2 Duer, 78.) *Maas v. Goodman*, 2 Hilt. 275.

34. **Factors, suit against.**—When partners are sued as factors, it is not necessary for them to set forth, in their answer, their claim for disbursements, commissions, etc., by way of set-off. *Lubert v. Chauviteau*, 3 Cal. 463.

35. **A counter claim, general rules.**—A counter claim, when established, must in some way qualify or must defeat the judgment to which a plaintiff is otherwise entitled. In a foreclosure suit, a defendant who is personally liable for the debt, or whose land is bound by the lien, may properly introduce an offset to reduce or extinguish the claim. But where his personal liability is not in question, and where he disclaims all interest in the mortgaged premises, he cannot demand a judgment against the plaintiff on a note, a bond, or a covenant. *National Fire Insurance Co. v. McKay*, 21 N. Y. (7 Smith) 191.

36. The only demands which defendant can set up as a counter claim are demands against the plaintiff. *Duncan v. Stanton*, 30 Barb. 533; and see *Cumings v. Morris*, 3 Bosw. 560.

37. In order to sustain a counter claim, the right of the plaintiff to claim, and the right of the defendant to counter claim, must be reciprocal. *Mayor, etc., of N. Y. v. Parker Vein Steamship Co.*, 12 Abb. Pr. R. 300.

38. A counter claim must have belonged to defendant at the commencement of the action. *Chambers v. Lewis*, 11 Abb. Pr. R. 210.

39. **A debtor may purchase cross demands, when.**—A debtor has a right to purchase cross demands against a partnership, and to set them up as a defense to a debt due by him to a partnership. *Naglee v. Minturn*, 8 Cal. 540.

40. **When and how pleaded.**—Under the plea of general issue, evidence of a counter claim is not admissible, but should be especially pleaded. *Hicks v. Green*, 9 Cal. 75.

41. Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts, showing that they constitute valid claims against the plaintiff, are sufficiently stated, the defenses ought not to be stricken out. See facts. *Wallace v. Bear River Water & Mining Co.*, 18 Cal. 461.

42. To entitle a defendant to set off a claim against the demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off, and when this was not done: *Held*, that the Court below properly rejected evidence of the claim proposed to be set off. *Bernar v. Mullet*, 1 Cal. 368.

43. Damages which do not legally result from the breach of the contract, cannot be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a

breach of the contract of his vendor to deliver the goods to him; and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in an answer. *Cole v. Swanton*, 1 Cal. 51.

44. In such a case, where the prayer of the bill is, that the judgment against the property of the plaintiff may be satisfied, upon his crediting the judgment obtained by him against the defendant in another Court, the application for set-off must be made in the Court in which the judgment adverse to the plaintiff was entered—that Court having control over that judgment, and the plaintiff having the power to credit or satisfy the judgment held by him against the defendant. *Russell v. Conway*, 11 Cal. 93.

45. A counter claim must exist in favor of defendant, and against the plaintiff, at the time the action was commenced; and an answer alleging that plaintiff is indebted, etc., and that the sum claimed is now due, &c., is bad on demurrer. *Rice v. O'Connor*, 10 Abb. Pr. R. 362.

46. A counter claim must state facts sufficient to constitute a cause of action against the plaintiff, and must be judged by the same rules as a complaint. *Merritt v. Millard*, 5 Bosw. 645.

47. But it is not enough to aver that the alleged counter claim arose out of the transaction set forth in the complaint. The facts which show this to be so must be averred. *So held*, on demurrer. *Brown v. Buckingham*, 11 Abb. Pr. R. 387.

#### § 48. Cross demands.

When cross demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counter claim could have been set up, neither shall be deprived of the benefit thereof, by the assignment or death of the other; but the two demands shall be deemed compensated, so far as they equal each other.

#### § 49. Several defenses.

The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.

N. Y. Code, § 150.

1. If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer. And if no objection be taken to the answer on this ground, defendant, on the trial, may rely on any of his defenses as under the old system. *Klink v. Cohen*, 13 Cal. 623.

8-c. 50. When the answer contains matter in avoidance, or a counter claim, the plaintiff may, within the number of days in which the defendant is by the summons required to answer, to be computed from the time of the service of a copy of such answer, demur to the same for insufficiency, stating therein the grounds of such demurrer; and when the answer contains a cross-complaint, the parties against whom relief is therein demanded may demur or answer thereto within the like period. Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant or immaterial, may be stricken out, upon motion, upon such terms as the Court in its discretion may impose.

#### Sham and irrelevant defenses.

When the answer contains new matter, the number of days in which the defendant may answer, said days to be computed from the time of the service of a copy of such

Answered 22/1/66  
 60 days

answer, demur to the same for insufficiency, stating in his demurrer the grounds thereof; and he may also, within the same time, demur to one or more defenses set up in the answer; sham and irrelevant answers and defenses, and so much of any answer as may be irrelevant, redundant and immaterial, may be stricken out on motion, and upon such terms as the Court in its discretion may impose.

N. Y. Code, § 152.

1. Irrelevant, redundant and immaterial allegations in answers.—An unessential, or what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material, may be determined by the question—"Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. *Green v. Palmer*, 15 Cal. 411.

2. In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual averments, went on to detail the manner of the seizure, with the incidents occurring on the street at the time, and everything done by defendants, plaintiff and the "crowd" relating to or constituting the evidence of the wrongful conversion: *Held*, that this narration should have been stricken out, on motion, as irrelevant and redundant matter. *Green v. Palmer*, 15 Cal. 411.

3. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an immaterial averment; and a recovery of damages would not establish plaintiffs' right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit. *McDonald v. Bear River and Auburn W. & M. Co.*, 15 Cal. 145.

4. Suit for services as agent of defendant under a contract. Defendant in answer sets up a violation of the contract on the part of the plaintiff, and also certain other matter, amounting to a tort on his part: as conspiracy to have the property of defendant sold, and bought in by him; circulating false reports that defendant was bankrupt, its affairs a swindle, etc.: *Held*, that this latter portion of the answer was properly stricken out, on motion of plaintiff. *Bates v. Sierra Nevada Lake Water and Mining Co.*, 18 Cal. 171.

5. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up, among other things, the following: "That said tract of land is situated in the heart of the mineral regions of said State, and is a part of the public domain belonging to the Government of the United States, and that said Government has never granted or conveyed the same, or any part thereof, to said plaintiff; they further say, that their said ditch was constructed in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the South Fork of the American river from a point about five miles above said land to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the same is fourteen miles in length, and was constructed for the purposes aforesaid at a cost to said defendants of about \$20,000," which allegations were stricken out, on motion of plaintiff's attorney: *Held*, that they were properly stricken out, as irrelevant; for, if true, they constitute no defense to the action. *Weimer v. Lowery*, 11 Cal. 104.

6. Irrelevancy in pleading as used in the Code, like impertinence as used in chancery practice, comprehends both prolixity, or needless details of material matter, and matter out of which no cause of action or defense could arise between the parties in the particular suit. *Lee Bank v. Kitching*, 11 Abbott's Pr. R. 435.

7. The libel charged the plaintiffs with fraudulent attempts to influence the Supreme Court in the determination of a suit, and with bribery of the Common Council. The answer averred a wasteful and improper course of conduct on the part of the Council, and that certain contracts obtained therefrom by the plaintiffs would result in vast profits to them, and in detriment to the city; and that they

falsely pretended to possess patent rights for paving, and made other false pretenses, and that they poorly performed previous contracts, and had obtained preferences over lower bidders: *Held*, that such averments were properly stricken out as irrelevant. *Russ v. Brooks*, 4 E. D. Smith's C. P. R. 645.

8. The test by which to determine whether the denials or statements in an answer are material or relevant, is to inquire whether they tend to make or constitute a defense; and if they do so tend, they cannot be considered irrelevant. *Doran v. Dinsmore*, 20 How. Pr. 503.

9. The ability of the plaintiff to demur, under section one hundred and fifty-three of the Code of Procedure, to one or more of the defenses set up in the answer, does not preclude a motion, under section one hundred and fifty-two, to strike out such matter from the answer as irrelevant. *Lee Bank v. Kitching*, 11 Abbott's Pr. R. 435, 485.

10. Where, in an action for malicious prosecution and false imprisonment, the complaint alleged want of probable cause, and the answer in one paragraph denied this with other allegations, and, as a subsequent defense, alleged that the defendant had probable cause: *Held*, that the latter should be stricken out, on motion, as redundant. *Ross v. Harris*, 11 Abbott's R. 446.

11. If one of several defenses set up in an answer is insufficient, it may be struck out, on motion, though it might also have been reached by a demurrer. *Lee Bank v. Kitching*, 11 Abbott's Pr. R. 435.

12. A demand for general relief is inconsistent with a demand for judgment in a specified sum, in an action for a money demand on contract, and should be stricken out. *Durant v. Gardner*, 10 Abbott's R. 445.

13. If an objection, which ought to be taken by demurrer—*e. g.*, that a defect of parties appears on the face of the complaint—is taken only by an allegation in an answer, it will be deemed to have been waived; and the allegation may be struck out of the answer, on motion. *Gassett v. Crocker*, 10 Abbott's R. 133.

14. **Sham answers, what are.**—A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false. *Piercy v. Sabín*, 10 Cal. 22.

15. Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants pleaded payment. Plaintiff, on affidavits that the plea was false and pleaded in bad faith, moved to strike out the answer, and for judgment. Granted: *Held*, that the ruling of the Court was right; that, under the fiftieth section of the Practice Act, "sham" answers and defenses are such as are good in form, but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out. *Gostorfs v. Taaffe, McCahill & Co.*, 18 Cal. 385.

16. Mere vagueness in pleading is not frivolousness; it is to be corrected by amendment, and not visited by judgment. It is enough, on a motion for judgment for frivolousness of the answer, that a good defense is "shadowed forth." *Kelly v. Barnett*, 16 How. Pr. R. 135.

17. Where, pending an action, the defendant recovers judgment against plaintiff in another action on the same matter, which he has set up as defense, it is proper to strike out the statement of such matter as a defense from the answer in the pending suit, though relief might be granted by allowing supplemental reply. *Harris v. Hammond*, 18 How. Pr. 123.

18. Though a specific denial of a part of the complaint may properly be coupled with a general denial of the rest, such a general denial is to be treated as sham if it merely purports to deny what is inconsistent with the facts stated in the answer. The Court cannot know whether the allegations of the answer are facts. *Blake v. Edwards*, 18 How. Pr. 240.

19. In an action for goods sold, or for services, the allegation of the value thereof in the complaint is material, and a verified answer containing a denial of that allegation cannot be stricken out as sham. *Gregory v. Wright*, 11 Abbott's Pr. 417-85.

20. An answer which is so framed that it does not set up a valid defense, but which states facts that may, by being properly averred, constitute a defense, will not be struck out as sham, irrelevant or frivolous. *Struver v. The Ocean Insurance Co.*, 9 Abbott's Pr. 23.

21. An answer which contains a denial of any material allegation of the complaint, if verified, cannot be stricken out as sham. *Gregory v. Wright*, *ante*, 417.

22. The provision of the Code "that sham and irrelevant answers and defenses may be stricken out on motion," applies equally to mere denials of allegations of the complaint as to affirmative matter, and equally to verified as to unverified answers. *The People v. McCumber*, 4 E. P. Smith's (18 N. Y.) R. 315, 323.

23. A defense is sham which is so clearly false as not to present any substantial issue. *Brewster v. Bostwick*, 6 Cow. 34; *Oakley v. Devoe*, 12 Wend. 196; *Broome County Bank v. Lewis*, 18 Wend. 565; *The People v. McCumber*, 4 E. P. Smith's (18 N. Y.) R. 315, 323.

24. **Surplusage.**—The averments in such complaint of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Halleck v. Mixer*, 16 Cal. 574.

25. Superfluous matter in a complaint, when inserted by itself, should be struck out or disregarded, as surplusage. *Boles v. Cohen*, 15 Cal. 150.

26. **What should not be stricken out.**—Though certain defenses, by way of set-off, are pleaded in the answer in a very informal and inartificial manner, still, if the facts showing that they constitute valid claims against the plaintiff are sufficiently stated, the defenses ought not to be struck out. *Wallace v. Bear River Water and Mining Co.*, 18 Cal. 461.

27. In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

28. The motion in this case to strike out the answers because denying on information and belief, and for judgment on the complaint: *Held*, to be properly overruled. *Comerford v. Dupuy*, 17 Cal. 308.

29. **Motion to strike out, when and where made.**—The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in *assumpsit*, that the defendant undertook and promised, in manner and form, etc.: *Held*, that the plaintiff would have been entitled to judgment on a motion in the Court below to strike out the answer as a nullity; but *Held, further*, that he should have raised his objection to the answer in the Court below and had it passed upon, and that having rested his cause at the trial on the ground of want of an affidavit, he will not be permitted to say here, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint. *Grogan v. Ruckle*, 1 Cal. 193.

30. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

31. If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system. *Klink v. Cohen*, 13 Cal. 623.

32. If every fact essential to the claim or defense be not stated, the adverse party may demur; and if any fact not essential to the claim or defense—in other words, any except issuable facts be stated, the adverse party may move to strike out the unessential parts. *Green v. Palmer*, 15 Cal. 411.

33. **An answer filed after the time for answering has expired.**—The Court in its discretion may strike it out or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer struck out. For these purposes defendant is not in default until his default has been actually entered in accordance with the statute. *Bowers v. Dickerson*, 18 Cal. 420.

34. **How to defend motion to strike out.**—When plaintiff moves on affidavit to strike out a defense as "sham," the affidavit of defendant that his defense is *bona fide* will defeat the motion. *Gostorfs v. Taaffe, McCallill & Co.*, 18 Cal. 385.

35. **Query:** Whether this section of the Practice Act applies to any but affirmative defenses. *Id.*

36. Inability of counsel to obtain defendant's verification in time may be good



ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

### § 51. *Pleadings to be verified.*

[1860, 1862.] Every pleading shall be subscribed by the party, or his attorney, and when the complaint is verified by affidavit, the answer shall be verified also, except as provided in the next section.

N. Y. Code, § 156.

1. An attorney in fact, who is not an attorney at law, cannot sign his name to a complaint for his principal as "plaintiff's attorney," and an action so commenced is void, as instituted without authority and by an entire stranger to the plaintiff. *Dixey v. Pollack*, 8 Cal. 570.

2. An answer unverified to a verified complaint may be stricken out on motion, and an application for a judgment as upon default may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

3. By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange, by requiring a sworn answer. *Brooks v. Chilton*, 6 Cal. 640.

4. The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. *Greenfield v. Steamer Gunnell*, 6 Cal. 67.

5. A party is not required to deny an indorsement under oath. An indorsee cannot give notes in evidence without proof of their indorsement. *Younge v. Bell*, 4 Cal. 201.

### § 52. *Pleadings, when not to be verified.*

[1860, 1862.] The verification of the answer, required in the last section, may be omitted, when an admission of the truth of the complaint might subject the party to prosecution for felony or misdemeanor.

N. Y. Code, § 157.

### § 53. *Copy of instrument, when deemed admitted as genuine.*

When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

1. This section does not extend to other parties than those who are alleged to have "signed" the instrument. *Heath v. Lent*, 1 Cal. 411.

2. Where, in an action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary, under the statute, that the administrator should deny the signature of the intestate on oath. It must be proved. *Id.*

3. A copy of the note sued on being attached to and made part of the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Horn v. The Volcano W. Co.*, 13 Cal. 62.

4. In a suit on a note, the complaint containing the note or a copy, a denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 112.

§ 54. *When deemed not admitted.*

Sec. 54. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the execution of such instrument shall be deemed admitted unless the plaintiff file with the Clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same; provided, that the due execution of the instrument shall not be deemed to be admitted by a failure to controvert the same on oath, as prescribed in this and the last preceding section, unless the party controverting the same is, upon demand, permitted to inspect the original before filing such answer.

*genuineness and due execution*  
 the defense to an action is founded upon a copy thereof is contained in the answer, or, the genuineness and due execution of the same shall be deemed admitted, unless the plaintiff file an affidavit denying the same previous to the commencement of the term at which the action is to be tried, an affidavit denying the same.

1. Exhibits attached to an answer, consisting of copies of the pleadings and proceedings in an action in the United States Circuit Court, need no further verification than what arises from the statement in the answer, that they are such copies; that no distinct verification of them is requisite; and were it otherwise, the certificate of the United States Circuit Court Clerk is sufficient. *Ely v. Frisbie*, 17 Cal. 250.

§ 55. *Pleadings, how and by whom verified.*

In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the Attorney General in behalf of the State, the pleading need not, in any case, be verified.

N. Y. Code, § 157.

1. **Belief, meaning of.**—The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief cannot exist together. *Humphries v. McCall*, 9 Cal. 59.

2. **Verification, when sufficient.**—If the pleading does not contain a statement of any matter on information and belief, there can be no occasion for any expression of belief in the affidavit as to any such matter. The object of the verification is to insure good faith in the averments of the party. If he avers matters positively, the verification will be sufficient if his affidavit states that the pleading is true of his own knowledge; if he aver matter "upon information and belief," or "upon information or belief," the verification will be sufficient if his affidavit states that as to the matters thus alleged he believes the pleading to be

true. To require anything further, would be to sink the evident spirit and object of the statute into a mere observance of its letter. It was not necessary that the verification should have been made by both of the plaintiffs. The affidavit of one of them was sufficient. *Frisbie v. Ely*, 20 Cal.

3. Defendants in this case, in answer to a rule to show cause why an injunction should not issue, filed their answer denying fully the allegations of the complaint, and verified in substance thus: "Wm. H. P., one of the defendants, being sworn, says his codefendant B. left this State for the State of New York before the complaint herein was filed, and is not in this State; that the foregoing answer is true of this defendant's own knowledge, except as to the matters therein stated to be upon the information and belief of defendants, and as to those matters he, the defendant, believes the same to be true." *Held*, that the verification of the answer, though not complying in form with the exact language of the statute, is sufficient to entitle the answer to be used as an affidavit. *Ely v. Frisbie*, 17 Cal. 250.

4. **When all the defendants must verify.**—In an action against husband and wife to set aside a conveyance to the wife as void as against creditors, the answer must be verified by both, if relied on as the answer of both. *Reed v. Butler*, 2 Hill. 589.

5. The verification of a complaint, like that of an answer, should be united in by every party who unites in the pleading, and whose interest is several. *Gray v. Kendall*, 10 Abbott, 66.

6. **When verification may be omitted.**—The verification of an answer may be omitted whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by such answer. *Drum v. Whiting*, 9 Cal. 422.

7. **When it cannot be omitted.**—The defendant is not excused from verifying his answer to a sworn complaint on the ground that the complaint charges him with fraud in the making of the assignment, which it is the object of the action to have set aside. *Wolcott v. Winston*, 8 Abbott, 422.

8. **Objections to verifications, how taken.**—The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with answer. The filing of an answer is a waiver. *Greenfield v. Steamer Gunnell*, 6 Cal. 69.

9. **Verification may be allowed before or at the trial.**—To a complaint verified, the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the Court by moving for judgment by default, which motion the Court sustained and refused to allow defendant to then verify his answer: *Held*, that the Court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

10. When the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. *Angier v. Masterson*, 6 Cal. 61.

11. **Answer may be stricken out, when.**—An answer unaccompanied by a required verification may be stricken out, and judgment ordered for plaintiff as upon a default. *Drum v. Whiting*, 9 Cal. 423.

12. **Before whom may be verified.**—The attorney of plaintiff being a Notary Public, may take the affidavit verifying the complaint. *Kuhland v. Sedgwick*, 17 Cal. 123.

13. A jurat to an answer is in form and substance an affidavit, and may be taken before a County Recorder. *Pfeiffer v. Riehn*, 13 Cal. 643.

## § 56. *Items of account. Bill of particulars.*

It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the

adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The Court, or Judge thereof, or a County Judge, may order a further account, when the one delivered is too general, or is defective in any particular.

N. Y. Code, § 158.

1. Where a copy of the account sued on, or set forth in the answer, is called for under the fifty-sixth section of the Practice Act, the items of the account furnished must be set forth with as much particularity as the nature of the case admits of; but the law does not require impossibilities, and if the party gives the items as definitely as he can, he does not forfeit his rights because of his inability to comply with a further demand for particulars. *Connor v. Hutchinson*, 17 Cal. 282.

2. Where the complaint in *hæc verba* set forth the bill of sale, it was held to remedy a defect in the description of the quantity of the goods sold; a party must be presumed to know what was intended by his own account. *Cockran v. Goodman*, 3 Cal. 244.

3. A bill of particulars does not change the nature of the action. It is not a declaration, nor is it a novel assignment. Its office is to apprise the opposite party of the claim made against him, so that he may not be surprised at the trial, and an omission or mistake, not calculated to mislead, will be deemed immaterial. (4 Wend. 360; 2 Taunt. 224; 1 How. Pr. 172; 3 M. & S. 380; 8 Bing. 411; 10 Wend. 258; 3 Id. 344.) Where the bill of particulars has not misled the opposite party, he cannot take advantage of it to exclude the offered proof. *Seaman v. Low*, 4 Bosw. 337.

4. **When and how objected to.**—It is too late to object at the trial that a bill of particulars is not properly verified by the oath of the party. The party upon whom a bill of particulars is served, if he is not satisfied with it, either because it is defective in form or in substance, or because it is not verified by the plaintiff, should immediately return it, or move the Court for a further or amended bill. *Dennison v. Smith*, 1 Cal. 437.

5. To suit on a note, defendant in general terms, without items, set up an account for work and labor, and for money paid, etc. Plaintiff asked for a copy of the account, which defendant furnished. Plaintiff gave notice that he would move the Court "for a further account of particulars, etc.;" and on hearing, the Court ordered that "defendant furnish said further bill," which he did. On the trial, plaintiff offered his note, and rested. Defendant offered evidence of the account set up in the answer, to which plaintiff objected, on the ground that "defendant had not furnished an additional bill of particulars," and the Court ruled out the evidence: *Held*, that the Court erred: first, because the order for a further account was defective, in not stating the particulars in reference to which a further specification was required; and because second, if the bill of particulars delivered under the order of the Court was not satisfactory, and plaintiff intended to object to any evidence upon the subject, he should have obtained, *previous to the trial*, an order excluding such evidence. *Conner v. Hutchinson*, 17 Cal. 280.

6. Without an order before the trial, excluding evidence of the account in such cases, the Court cannot on the trial exclude. *Id.*

### § 57. Irrelevant or redundant matter.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the Court, on motion of any person aggrieved thereby.

N. Y. Code, § 160. See § 50, and authorities.

1. The rule which governs motions to compel amendments of pleadings is: If an answer, a separate denial, or defense, otherwise good, be loaded with unneces-

sary or redundant matter, a motion should be made to have the matter expunged, under section one hundred and sixty; if either of such pleadings contain new matter, not redundant, and doubts are entertained of its sufficiency in law, it may be tested by demurrer; if the whole answer be frivolous, application for judgment, under section two hundred and forty-seven, is the proper remedy; and if an answer, denial, or separate defense, be false or irrelevant, the only remedy is a motion to strike out, under section one hundred and fifty-two. (6 How. Pr. 358.) A motion to strike out a whole defense, under section one hundred and sixty, cannot be granted; but if, on a motion framed under that section, the notice ask for general relief, it may be considered as made under section one hundred and fifty-two, and reaching the whole answer or defense. *Blake v. Eldred*, 18 How. Pr. 240.

### § 58. *In real actions, how to describe property.*

In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint.

1. The mining claim, in this case, being a claim on a river bar, is sufficiently described in the complaint. See facts. *Grady v. Early*, 13 Cal. 108.

2. A complaint in ejectment, describing the premises as "lot No. 1 in block No. 23, as per plot of the town of Red Bluff Land Corporation, in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated by the terms "in said county," referring to the designation "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 432.

3. Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. *Castro v. Gill*, 5 Cal. 40.

4. Actions for the foreclosure of a mortgage are not governed by this section. *Emeric v. Tams*, 6 Cal. 155.

5. The following notice of a mechanic's lien does not contain such a description of the premises as the statute contemplates: "A dwelling house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —." The fact that Conner owned no other building on that street would not cure the defect. *Montrose v. Conner*, 8 Cal. 344.

### § 59. *Judgments, how pleaded.*

In pleading a judgment, or other determination of a Court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

N. Y. Code, § 161.

1. The answer to a suit on a note set up defendant's discharge in insolvency. Plaintiff demurred to the answer, on the ground that it did not allege that the note was described, set forth and included in defendant's schedule: *Hed*, that the demurrer was not well taken; that, under section fifty-nine of the Practice Act, it was sufficient to allege in the answer that a judgment had been duly rendered, discharging defendant from the demand sued on; and that whether the demand was sufficiently described was matter of evidence to be determined at the trial by inspection of the record. *Hanscom v. Tower*, 17 Cal. 518.

2. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the Court on its face, it is not necessary to aver jurisdiction. *Low v. Burrows*, 12 Cal. 181.

3. A certificate of the proceedings of the Surrogate's Court of New York, which states that A. W. Bradford is Surrogate of the city and county of New York, and acting Clerk of the Surrogate's Court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and finds the same to be correct, and a true copy of all the proceedings; and that the certificate is in due form of law—in testimony whereof he sets his hand and affixes his seal of office—is sufficient. *Id.*

4. Under the Act of Congress respecting the authentication of the record of a Court of one State to be used in another, it is only necessary that the certificate should state the main facts which are made necessary by the act, when the offices of Judge and Clerk are both vested in one person. *Id.*

5. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the Court on its face, it is not necessary to aver jurisdiction. *Id.*

6. The certificate of the magistrate that the Clerk's "attestation is in due form of law," is conclusive that the attestation is in proper form for the purpose of the admissibility of the copy of the record in evidence. It is made by the Act of Congress the only evidence on that subject. 1 Greenl. Ev. sec. 506; *Drummond v. Magruder*, 9 Cranch, 122; *Craig v. Brown*, 1 Pet. C. C. 852; *Smith v. Blagge*, 1 Johns. 238; *Ferguson v. Harwood*, 7 Cranch, 408; *Edmiston v. Schwartz*, 13 S. & R. 135; 2 Cow. & Hill's Notes, 860, 861, 1150, 1132, 1133; *Hatcher v. Rochelleau*, 4 E. D. Smith (18 N. Y.) 86.

7. **Courts of limited jurisdiction.**—In pleading the judgment of a Probate Court, it being a Court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. (This rule is altered by statute of 1858, p. 95, ch. 120.) *Smith v. Andrews*, 6 Cal. 652.

8. The law presumes nothing in favor of the jurisdiction of Justices' Courts, and a party who asserts a right under the judgment of a Justice, must affirmatively show every fact necessary to confer such jurisdiction. *Swain & Marsh v. Chase*, 12 Cal. 283.

## § 60. Conditions precedent, how to be pleaded.

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall establish, on the trial, the facts showing such performance.

N. Y. Code, § 162.

1. **Performance of conditions precedent.**—The allegation that the plaintiff had fully performed, on his part, all conditions of the contract, is an allegation of performance sufficiently explicit under section sixty of the Practice Act. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 258.

2. In suit in equity to set aside a judgment by default on a return by the Sheriff of personal service, on the ground that defendant in fact was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought: *Held*, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was, or has been at any time, ready or willing to perform the same. *Gibbons v. Scott*, 15 Cal. 284.

3. Where A sold a lot of land to B and delivered possession, and in a written contract respecting the same it was stipulated, among other things, that in the event that B should be dispossessed by legal judgment at any time within three years, A should pay back to B \$2,000; and should suit be brought against B for the lot, then B should notify A of it, in order to enable him to assist in the defense of the title: *Held*, that the giving of the notice by B to A of the institution of suit against B for the lot, was indispensable to enable B to recover of A on such contract. *Bensley v. Atwell*, 12 Cal. 231.

4. In a suit on such contract, B should aver that he had been evicted after notice to A. The payment of the money is dependent upon this fact. *Id.*

5. The plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and canceled such security upon B executing a bond in their favor, the condition of which was that B should pay to the plaintiffs such amount, not exceeding \$4,000, as should be found due to them from M. after sale of certain goods and the winding up of the accounts of M. with the plaintiffs, the payment of which bond was guaranteed by the defendant under the same conditions expressed therein: *Held*, in an action on the defendant's guaranty, that the want of an averment in the complaint of the winding up of the accounts of the plaintiffs with M., or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint. *Mickle v. Sanchez*, 1 Cal. 200.

6. The clause of section one hundred and sixty-two of the Code, relating to averring the performance of conditions precedent, has no application to averments necessary to charge the drawer of a bill of exchange. It is applicable to conditions expressed in a contract which, by the terms thereof, are to be performed "on his part," i. e., by the party thereto, and which, but for this section, he must state to have been performed by him in detail. And the object of the Legislature was to avoid prolixity in pleading, by permitting him to aver generally (by grouping all the conditions to be performed by himself) that he had duly performed them all. The section substitutes a general averment of performance for a statement in detail of each distinct act. Its purpose was not to give to the word "duly," when applied to a single specific averment, any such comprehensive force and meaning as to make the use of that word tantamount to an averment of every other fact necessary to make the presentment which is averred a legal presentment, disproving of *Gay v. Paine*, 5 How. Pr. R. 107; *Woodbury v. Sackrider*, 2 Abbott's Pr. R. 402. *Graham v. Machado*, 6 Duer, 515.

7. It seems that the word "party," in the provision of section one hundred and sixty-two of the Code, that "it may be stated generally that the party duly performed all the conditions on his part," means the person or persons by whom the conditions were to be performed, and the plaintiff in the suit, not necessarily the person who is the party to the contract. Upon a liberal construction [Code, secs. 159, 467] the section means, that it may be stated generally that the person or persons by whom the conditions were to be performed have duly performed, etc. *Rowland v. Phalen*, 1 Bosw. 43.

8. Where an instrument for the payment of money, on which the action is brought, is written in a foreign language, it is sufficient to give a copy of it in the complaint, under section one hundred and sixty-two of the Code. So held on demurrer. *Naurny v. Dubosty*, ante, 128.

9. In an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third parties to do certain acts, the complaint alleged performance on their part in the following form: And the plaintiff further says, that he and those on whose behalf the said agreement was made and entered into by him, have fully and faithfully performed and fulfilled all and singular the covenants and agreements in the said agreement contained, on the part of the said plaintiff, and those on whose behalf the said agreement was made and entered into by him as aforesaid: *Held*, sufficient, under section one hundred and sixty-two of the Code. When the plaintiff avers that he has fully and faithfully performed all and singular the covenants, etc., on his part, he does aver that everything was done which he was bound to do, or to cause to be done; and he only strengthens this averment when he adds that those on whose behalf he acted have also performed. In no aspect can the addition of this statement impair the effect of his averment. *Rowland v. Phalen*, 1 Bosw. 43.

§ 61. *Private statutes, how to be pleaded.*

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof.

N. Y. Code, § 163; Van Sant. Pleadings, 270, 496; 5 Sand. 153.

1. When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts; those facts which the statute requires as the foundation of the right must be stated in the complaint. *Dye v. Dye*, 11 Cal. 163.

§ 62. *Libel and slander, how stated in the complaint.*

In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall establish, on the trial, that it was so published or spoken.

N. Y. Code, § 164.

1. **Insufficient allegations.**—In a complaint for slander, the first count contained an introductory averment that the defendant, contriving and intending to have it believed that the plaintiff was intending to commit a certain crime, uttered certain words by which, the *innuendo* declared, the defendant meant to charge the plaintiff with attempting to commit such crime: *Held*, insufficient. The mere intention to commit a crime, without an attempt by some overt act, is no offense. And it is well settled that the *innuendo* cannot enlarge the meaning of the words spoken beyond the averment of the intention by which the speaking of the words is introduced, where the words themselves are ambiguous, and do not necessarily impute a crime. *Weed v. Bibbins*, 32 Barb. 315.

2. **Sufficient allegations.**—But a second count, which averred that the defendant intended to have it believed that the plaintiff had produced a false and pretended child, as born of herself and her deceased husband, in order to gain possession of certain property under a will, the *innuendo* and averment being alike, was held sufficient, although the words spoken did necessarily impute a crime, a criminal offense being clearly imputed by the words when understood in the light of the introductory averment and the *innuendo*. *Id.*

3. In an action of slander, where the words charging plaintiff with giving false testimony are not actionable in themselves, it is incumbent on the plaintiff to show that they were spoken in reference to a judicial proceeding before a Court or officer of competent jurisdiction. *Bonnar v. McPhail*, 31 Barb. 106.

4. That in an action for libel, an allegation in the complaint that the defendant was the proprietor of the newspaper is sufficient, without otherwise alleging that he published it, or was concerned in its publication. *Andres v. Wells*, 7 Johns. 260, 262, 263; *Hunt v. Bennett*, 19 N. Y. (5 E. P. Smith) 174.

5. Where the matter charged is libelous as a matter of law, an allegation that it was false and malicious is unnecessary; and if it were necessary, an allegation that it was a libel is a sufficient allegation of falsehood and malice. *Id.*

6. Though when a slander is couched in ambiguous, ironical or insinuating words, it is necessary to aver that the defendant, in using it, meant to be and was understood by the hearers as charging the plaintiff with the crime imputed. (*Gib-*



*son v. Williams*, 4 Wend. 320; *Andrews v. Woodmanson*, 15 Id. 232; 5 East. 463.) Yet words actionable in themselves require no allegation as to the way in which they were understood by the hearers. *Walrath v. Nellis*, 7 How. Pr. 72.

7. To say of a man, after a libel has been published, that he is the author of it, is actionable *per se*. *Viele v. Gray*, 10 Abbott, 1.

8. **Variance.**—In an action for an alleged libel, a variance between the date of the libel as set forth in the complaint, and as shown in the evidence, is not material, unless the defense is misled by it. *Thrall v. Smiley*, 9 Cal. 529.

9. **Evidence.**—In an action of slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the Court refused to hear such proof: *Held*, that such ruling of the Court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. *Bradley v. Gardner*, 10 Cal. 371.

10. **Damages.**—In an action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages. *Butler v. Howes*, 7 Cal. 87.

11. Exemplary damages may be recovered in an action for defamation. *Hunt v. Bennett*, 19 N. Y. (5 E. P. Smith) 174.

12. Actual damage is not necessary to sustain a verdict for exemplary damages. *Fry v. Bennett*, 9 Abbott, 45.

13. An action for slander, in which special damage is necessary to be proved, cannot be sustained by showing that the plaintiff, in consequence of the effect on his mind, occasioned by the words reported to him, was made sick and unable to labor. The pecuniary loss required to be shown where the words are not actionable *per se*, must be the effect of the slander upon other persons. *Tervilliger v. Wands*, 17 N. Y. (3 E. P. Smith) 54.

14. The same principle precludes a husband from recovering in an action for such slander upon his wife, where her illness and inability to work is the only special damage. *Wilson v. Gait*, Id. 442.

### § 63. Answer in such cases.

In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

N. Y. Code, § 165.

1. **Justification, what must be alleged.**—To constitute a justification in an action for a libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the fact detailed can only avail in mitigation of damages. *Thrall v. Smiley*, 9 Cal. 529.

2. An answer to a complaint for slander, which shows that defendant was informed and believes the charges were true; that the offenses charged were in fact committed, and as defendant believes by the plaintiff, and disavowing malice in making the charges, is sufficient as a justification. *Steinman v. Clark*, 10 Abbott, 132.

3. In an answer to a complaint for libel, matter which is alleged in justification may also properly be alleged in mitigation of damages. *Howard v. Raymond*, 10 Abbott, 155.

4. **Counter claim for slander of defendant.**—In an action for slander, the defendant cannot set up in an answer which contains a general denial,

a counter claim against the plaintiff for a slander alleged to have been uttered by him shortly before the day specified in the complaint. *Fellerman v. Dolan*, 7 Abbott, 395, note.

5. **Malice.**—It is error for the Court to instruct the jury "that when a person injuriously slanders the title of another, malice is presumed. *McDaniel v. Baca*, 2 Cal. 326.

6. **Proof by defendant.**—The defendant may prove the reply by plaintiff immediately after defendant uttered the slanderous words. *Bradley v. Gardner*, 10 Cal. 371.

### § 64. *What causes of action may be joined.*

[1855.] The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

1st. Contracts, express or implied.

2d. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3d. Claims to recover specific personal property, with or without damages, for the withholding thereof.

4th. Claims against a trustee by virtue of a contract, or by operation of law.

5th. Injuries to character.

6th. Injuries to person.

7th. Injuries to property. But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated.

Provided, however, that an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

N. Y. Code, § 167.

1. **Causes of action which may be united.**—All matters arising from and constituting part of the same transaction may be litigated in the same action. Every action, under our system, may be termed an action on the case, and any ground of relief which can be regarded as part of the case may be included in the action. *Jones and Wife v. Steamship Cortes*, 17 Cal. 487.

2. **Tort and contract may be united, when.**—Under our system, a cause of action in tort may be united with a cause of action on contract, if the two causes of action arise out of the same transaction. *Id.*

3. Cases from New York cited to show, that although there as here the statute provides a claim for injuries to the person shall not be joined with a claim for injuries to character, yet if the facts of the whole case or transaction embrace an injury to the person and also an injury to the character, then plaintiff may recover in one action for the compound injury. *Id.*

4. Legal and equitable grounds of relief may be united in the same action. The action *Newbens v. Joel*, 13 N. Y. (3 Kern.) 488, explained. *New York Ice Co. v. North Western Ins. Co.*, 12 Abbott, 74, 414.

5. Whether the provision of section one hundred and sixty-seven of the Code, allowing both legal and equitable causes of action to be united, extends to any other than that class of cases in which it was formerly well settled that a Court of Equity, having acquired jurisdiction, could go on to administer legal relief, *Query?* *Lattin v. McCarty*, 8 Abbott, 225.

6. It is not necessary, in an action against a Sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Parker v. Freer, Sheriff*, 9 Cal. 642.

7. There was no misjoinder of cause of action in this case. When a defendant pleads another suit pending between the same parties, and for the same cause of action, and it appears that no summons was ever issued upon the complaint, and that there was no voluntary appearance on the part of the defendant in such suit: *Held*, that there was no suit pending, and consequently no misjoinder of causes of action. *Weaver v. Conger*, 10 Cal. 233.

8. Where a suit was brought to foreclose a mortgage executed by husband and wife to secure a note made by the husband alone, and the complaint prayed for judgment against the husband for the amount of the note and interest, and a decree against both defendants for the sale of the mortgaged premises: *Held*, there was no misjoinder of actions, and the complaint was not demurrable on that ground. *Rollins v. Forbes and Wife*, 10 Cal. 299.

9. The plaintiff sued to recover damages from defendant for his breach of a contract to publish a book from certain stereotype plates delivered; for the loss of the plates by the defendant through his gross carelessness and negligence; for the moneys advanced to him upon the contract by the plaintiff; for the damages arising from his delay in the publication; and for the additional expense over the contract price, in subsequently publishing the book: *Held*, that the causes of action were such as might properly be united. *Badger v. Benedict*, 1 Hilt. 414.

10. Separate causes of action, arising out of breach of contract, and injuries to property, the subject of the contract, intrusted to another to enable him to perform it, may properly be joined, as arising out of one transaction. *Id.*

11. The complaint, in an action against carriers, stated, as a first cause of action, that the defendants lost or converted a portion of the goods intrusted to them, and demanded damages therefor; as a second cause of action, that when they delivered the balance, the plaintiffs, not knowing of the deficiency, paid them freight as if the whole had been delivered, and demanded to recover back the excess of freight: *Held*, that these claims were properly united in one action. *Adams v. Bissell*, 28 Barb. 382, 385.

12. The plaintiff, being both executrix and devisee of the testator, sued the testator's lessee, joining a claim for rent, subsequent to the decease of the testator, with a claim for damages for breach of covenant respecting personal property embraced in the lease: *Held*, not a misjoinder. The testator might have brought one action. Plaintiff had a common interest as executrix and devisee. 1 Paige, 20; 12 Barb. 28; *Armstrong v. Hall*, 17 How. Pr. R. 76.

13. Under our Practice Act, it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action. *Sullivan v. Davis*, 4 Cal. 291.

14. Causes of action for libel, slander, and malicious prosecution in behalf of the People, for a crime, may be joined in one action. They are all injuries to character. *Martin v. Mattison*, 8 Abb. Pr. 3.

15. Value of property destroyed and damages for the same may be joined. *Tendessen v. Manhall*, 3 Cal. 440.

16. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendants' dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears Union Water Co.*, 12 Cal. 555.

17. The union in one count of a complaint, of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek \* \* so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they \* \* hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel," the accumulation of which

renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

18. **Causes of action which cannot be united.**—A claim for damages for a personal tort cannot be united with a demand properly cognizable in a Court of Equity in the same action. *Mayo v. Madden*, 4 Cal. 27.

19. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike Co.*, 5 Cal. 224.

20. It is improper to join an action of trespass *quare clausum fregit* with ejectment and prayer for relief in chancery. *Bigelow v. Gove*, 7 Cal. 133.

21. A claim for money against a husband cannot be joined with a claim against the separate estate of the wife, although arising out of a single transaction. *Palen v. Lent*, 5 Bosw. 713.

22. It seems that the defendants might have moved to compel the plaintiff to elect which cause of action he would prosecute. *Hess v. Buffalo and Niagara Falls and New York Central Railroad Co's*, 29 Barb. 391.

23. The complaint was against two, for use and occupation. On the trial, the plaintiff offered a landlord and tenant's agreement, with guaranty, by which it appeared that one defendant was lessee and the other merely surety: *Held*, that the misjoinder of actions was fatal to a judgment for plaintiff. It was not necessary that the defendant should raise the objection by demurrer, as it did not appear on the complaint. *Phalen v. Dingee*, 4 E. D. Smith's C. P. R. 379; 8 Abb. Pr. R. 518.

24. Where a complaint against two defendants alleged that one of them erected a building across an alley of the plaintiff, and thus obstructed his right of way; that such defendant then transferred the building to the other defendant, who continued the obstruction; and prayed judgment against both defendants: *Held*, first, that the complaint stated a good cause of action against each defendant separately; second, that the causes of action were distinct, the continuance of the nuisance being a fresh nuisance; third, that the complaint was bad on demurrer, as improperly joining causes of action; fourth, that the defendants might demur jointly. *Hess v. Buffalo and Niagara Falls and New York Central Railroad Co's*, 29 Barb. 391.

25. A broker, employed to effect the sale of lands, sold them to his own clerk, who was employed in the affairs of the vendor relating to the land, and by his employment acquired special knowledge concerning it: *Held*, first, that although the price agreed to be paid was fair, and the purchase money was adequately secured, the sale could not be sustained. The rule which, in such a case, forbids the broker from selling to himself, equally forbids him from selling to his clerk or assistant. Second, that he could not join the broker and the clerk in one action, claiming the alternative relief of a reconveyance by the latter, or from the two the value of the lots at the commencement of the action. Although the two causes of action arise out of the same transaction, they do not affect both of the parties defendant. They are separate and distinct causes of action, which cannot be joined under the Code. *Gardner v. Ogden*, 22 N. Y. (8 Smith) 327.

26. **Causes of action must be separately stated.**—The common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 146.

27. Complaint in ejectment may be for two separate and distinct pieces of land but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 150.

28. Objection to the misjoinder of parties and of causes of action should be taken by demurrer or answer, or they are deemed waived. *Jacks v. Cooke*, 6 Cal. 164.

29. If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Macondray v. Simmons*, 1 Cal. 293.

30. The plaintiff, having a claim against A, brought suit against him to enforce

the claim, and, in the same action, sought to set aside a conveyance of real estate from A to B, on the ground that it was executed in fraud of the creditors of A, and made B a party to the suit: *Held*, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A to B. *Id.*

31. An objection that different causes of action have been improperly joined, is waived by the failure of defendants to demur. *Marius v. Bicknell*, 10 Cal. 217.

### § 65. Allegation not denied, when to be deemed true.

[1854, 1860, 1862.] Every material allegation of the complaint, not controverted by the answer, shall, for the purpose of taking as true; the allegation of new facts on trial, be deemed controverted by the adverse party.

N. Y. Code, § 168.

1. **Material allegations.**—What constitute material allegations. See *ante*, page 51, "Material averments, test of."

2. **When general denial not sufficient.**—A general and sweeping denial in a verified answer is not sufficient to controvert specifically each material allegation of the complaint. *Dewey v. Bowman*, 8 Cal. 145; *Humphries v. McCull*, 9 Id. 59.

3. The complaint verified set forth that the plaintiffs are owners and entitled to the possession of certain mining claims therein described, and that the defendants wrongfully entered upon and dispossessed the plaintiffs, as alleged in the complaint. The answer denies specifically the allegations of ownership and right of possession, and denies that the defendants wrongfully and unlawfully entered and dispossessed the plaintiffs. The facts of entry and ouster are the only issuable facts presented in this allegation, and in the absence of a denial in positive and unequivocal terms, they are, for the purposes of the action, to be taken as true. *Busenius v. Coffee*, 14 Cal. 91.

4. The omission of the words "when it is verified," in the Act of 1860, amending the sixty-fifth section of the Practice Act, (repealed in 1862) is a mere clerical mistake. The amendment of the Act of 1860 to this section, and also to section forty-six, was not designed to change the character of answers, or to abolish any distinction between those verified and those not verified. *Skirm v. Farland*, 18 Cal. 314.

5. As to sufficiency of denials in answers, see *ante*, page 84.

### § 66. What is a material allegation.

A material allegation in a pleading is one essential to the claim, or defense, and which could not be stricken from the pleading without leaving it insufficient.

See *ante*, page 51, number 21.

Sec. 67. After demurrer, and before the trial of the issue of law thereon, the pleadings demurred to may be amended, as of course, and without costs, by filing the same as amended and serving a copy thereof on the adverse party or his attorney within ten days, who shall have ten days thereafter in which to demur or answer thereto; but a party shall not so amend more than once. A demurrer shall not be deemed waived by the filing of an answer at the same time of filing the demurrer, or at any time thereafter; and when the demurrer to a complaint is overruled, and there is no answer filed, the Court may, upon terms, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer shall be considered as denied to the extent mentioned in Section 65. Where circumstances occurring subsequently to the commencement of the action render it proper, the same may be presented by supplemental pleadings and issues taken thereon in the same manner as in the case of original pleadings.

effect of demurrers.

After, and before trial of issue in ten days, amend any pleading without costs, filing the same as amended upon the adverse party, or

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his attorney, who shall have ten days to answer, or demur thereto, but a party shall not so amend more than once; when a demurrer to a complaint is overruled, and there is no answer filed, the Court may, upon such terms as may be just, and upon payment of costs, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer shall still be considered as denied.

1. Defendant will not be permitted to amend his answer so as to introduce the Statute of Limitations, unless it be in furtherance of justice. *Cooke v. Spears*, 2 Cal. 409.

2. The party desiring amendment after demurrer sustained, must make his motion to the Court, and he cannot object on appeal that he was not permitted to amend when he made no offer. *Smith v. Yreka Water Co.*

3. Where the complaint is defective, the Court should sustain the demurrer, with leave to the plaintiff to amend his complaint, and if the plaintiff then declines, final judgment should be given. *Gallagher v. Delany*, 10 Cal. 410.

4. The defense relied on in the answer in this case being invalid, it was not error to refuse permission to amend after judgment sustaining a demurrer to the answer. Besides, the allowance of the amendment was matter of discretion, for the abuse of which only could this Court interfere. *Gillan v. Hutchinson*, 16 Cal. 153.

5. Where a party is entitled to amend of course, he may amend by substituting an entirely different defense for that set up in the original answer—e. g., limitations, in lieu of a counter claim. [Following *Thompson v. Minford*, 11 How. Pr. 273, and *Mason v. Whitely*, 1 Abbott's Pr. 85, in preference to 10 How. Pr. 140.] *Wyman v. Remond*, 18 How. Pr. 272.

6. **Amendments at the trial.**—A Court may, in its discretion, allow a plaintiff, after the defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence; nor is such action any ground for reversal, unless it appear that injustice has been done by an abuse of discretion. *Priest v. Union Canal Co.* 6 Cal. 170.

7. After the motion for a nonsuit, the Court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff cannot recover. *Farmer v. Cram*, 7 Cal. 135.

8. The Court may allow, after the close of plaintiff's evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Polk & Hensley v. Coffin & Swain*, 9 Cal. 56.

9. To a complaint verified, the defendant filed a copy of the original verified answer by mistake. Parties took depositions under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the Court, by moving for judgment by default, which motion the Court sustained, and refused to allow defendant to then verify his answer: *Held*, that the Court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

10. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial permitted the other defendant to file a separate plea of the statute: *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to revise it. *Robinson v. Smith*, 14 Cal. 254.

11. The Court below has power to grant amendments whenever, at any stage of the trial, they are necessary to the purposes of justice, and this power should be liberally exercised to secure a fair and speedy trial on the merits. *Lestrade v. Barth*, 17 Cal. 285.

12. When it appears by the plaintiff's testimony that there is a misjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the Court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just. *Acquittal v. Crowell*, 1 Cal. 192.

13. Upon the trial, a misnomer should be amended, and, if it has not misled, without terms. 19 N. Y. 37; *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355.

14. The proper remedy against a misnomer is by motion to set aside the proceedings. It cannot be reached by answer or demurrer. 19 N. Y. 37; *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355.

15. **Amendments by striking out or adding parties before and after judgment.**—Where it appears by the plaintiff's testimony at the trial that there is a nonjoinder of persons who should have been plaintiffs, and a motion for a nonsuit is made on this ground, the Court may permit an amendment by adding the name of a coplaintiff on such terms as may be just. *Acquittal v. Crowell*, 1 Cal. 191.

16. Where several persons conspire to obtain the land of plaintiffs, and in suit against them to recover the property, two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties and are liable for costs. *Dupuy v. Leavenworth*, 17 Cal. 262.

17. Whether the Court can, after ordering defendants, against whom no proof is adduced, to be stricken from the pleadings, reinstate them in the progress of the trial. *Beach v. Covilland*, 2 Cal. 237.

18. The Court may allow, after the close of plaintiff's evidence, the complaint to be amended by adding the name of another party plaintiff, if it does not affect the substantial rights of the parties. *Polk & Henry v. Coffin & Swain*, 9 Cal. 56.

19. Ejectment against K., claiming as owner, and R., his tenant, and L. & B., sublessees of R. Summons served on L. & B. only, who were in possession. No answer, and default taken. Suit dismissed as to K. and R., and judgment entered by the Court against L. & B. for restitution. K. applies on affidavit for an order vacating the judgment, and for permission to defend: *Held*, that K. had a right to be admitted to defend; and that the judgment was properly vacated for that purpose. *Roland v. Kreyenhagen*, 18 Cal. 455.

20. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the Clerk in entitling the cause, the error may be corrected in the Supreme Court, or the Court below, on motion. *Browner v. Davis*, 15 Cal. 9.

21. An alteration by the Court of a judgment, without notice, so as to include a party not served with process, if not void, is voidable at the election of the party. *Chester v. Miller*, 13 Cal. 558.

22. If a judgment entered be irregular, as embracing more parties than the testimony justifies, the proper practice is to move to correct the judgment in the Court below. *Multiken v. Hull*, 5 Cal. 245.

23. It seems that a purely formal error, e. g., the misnomer of a party, no one having been misled, should be amended on the trial without imposing any terms. *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355.

24. Such an amendment may be made before or after judgment, and on a judgment taken by confession, if in furtherance of justice. *Id.*

25. On a judgment and execution against Freeman Hildreth, the property of Truman Hildreth was sold: *Held*, that although the latter might be the person intended, the sale was unauthorized, and absolutely void. It did not divest Truman Hildreth of his title, nor convey any title to the purchaser; and an order of the Court made *ex parte*, subsequent to the sale, amending the judgment record by substituting the name of Truman wherever the name of Freeman appeared, did not confirm his title. The Court cannot thus by order summarily divest one person of his title, and in effect transfer it to another. *Farnham v. Hildreth*, 32 Barb. 277.

26. In an action against three defendants for a wrong, one of the defendants died pending the action, and a discontinuance was entered as against another. Judgment for the plaintiff having been given, the remaining defendant moved to vacate it for irregularity, and the plaintiff asked to have it amended to stand against the remaining defendant alone: *Held*, that the amendment should be granted. The power of amendment under the Code, either before or after judgment, by adding or striking out the names of parties, is comprehensive, and includes almost all cases which can arise and call for the interposition of the Court. *Sherman v. Fream*, 8 Abbott's Pr. 33.

27. An individual banker commenced an action in his banking name: *Held*, a misnomer. An individual banker is not a corporation sole. 19 N. Y. 37; *Bank of Havana v. Magee*, 20 N. Y. (6 Smith) 355.

28. **Amendments to complaint.**—The plaintiffs should be permitted, if they desire, to so amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

29. It is error to refuse to allow a plaintiff to strike out a claim for damages, without regard to the purpose which may influence him. *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 413.

30. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After a trial and verdict, which was set aside by the Court, he amended his complaint, to make in form an action of trespass for *mesne* profits: *Held*, that was erroneous, and should not have been permitted. *Ramirez v. Murray*, 5 Cal. 222.

31. Upon the remittitur of a cause to the Court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. *McDonald v. Bear River Water and Mining Co.*, 15 Cal. 149.

32. Where the proof does not sustain the allegations of the bill, and where by the proof the complainant would be entitled to relief in a Court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done it is error. *Connolly v. Peck*, 3 Cal. 82.

33. A Court may order judgment creditors, as subsequent incumbrancers, to be made parties to an action, by an amendment of the complaint, as a better course, or by petition or intervention. *Horn v. Volcano Water Co.*, 13 Cal. 70.

34. The misjoinder of parties can be corrected by amendment under the statute. *Heath v. Lent*, 1 Cal. 412.

35. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the Court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint, if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner and Wife*, 10 Cal. 296.

36. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Smith v. Billet*, 15 Cal. 26.

37. In an action brought by a corporation claiming to have been incorporated in 1852, under a general law, it appeared on the trial that a part of the indebtedness sued on accrued to a corporation of the same name as plaintiffs, before that date; that such corporation was originally formed by special charter, and that on the expiration of that charter in 1852, the present corporation was organized under the general law, and the portion of the indebtedness in question was passed to it, with other assets, by assignment: *Held*, 1st, that the variance could not be amended by a referee; 2d, that the Court had power to amend it upon terms. *Union Bank v. Mott*, 10 Abbott's Pr. 372.

38. It does not follow that, because the complaint does not state facts sufficient to constitute a cause of action, the Judge at the trial is bound to dismiss it on the defendant's motion. It is true that the defendant does not waive the objection by omitting to demur; but if the evidence at the trial supplies the defect in the complaint, without in substance changing the nature of the claim, the plaintiff is entitled to amend. *Lounsbury v. Purdy*, 4 E. P. Smith's R. (18 N. Y.) 515.

39. It seems that a plaintiff may recover commissions on a larger sum than that alleged in the complaint; as the complaint may be amended. *Morgan v. Mason*, 4 E. D. Smith's C. P. R. 636.

40. Facts occurring after suit brought cannot, under any circumstances, be incorporated into a complaint by way of amendment, nor can they be brought before the Court by supplemental complaint, when the original complaint states no cause of action. No party can recover in an action which was commenced when the cause of action had not occurred. *McCullough v. Colby*, 4 Boew. 603.

41. The complaint, in an action brought by a bank in the name of the President, did not contain any allegation to show that the bill had been negotiated to the plaintiff's bank, though the plaintiff named himself as President of the association: *Held*, that the intention to enforce a claim in favor of the bank was plain,



and leave to amend on payment of costs was proper. *Van Duzer v. Howe*, 21 N. Y. (7 Smith) 531.

**42. Amendments by filing supplemental complaint.**—Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendant, and in consequence, the character of the judgment which is sought, cannot be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Van Maren v. Johnson*, 15 Cal. 311.

**43.** When suit is brought against a female, who subsequently marries, her husband must be made a codefendant. But this should be done, and an averment of the marriage be made, by a supplemental complaint, and not by an amendment to the original. *Id.*

**44. Amendments to conform pleadings to facts.**—Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a Court of Equity, if his pleadings had been properly framed, an amendment should be allowed, or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the Court to decree fully on the merits; and whenever this is not done, it is error. *Connally v. Peck*, 3 Cal. 82.

**45.** A party has a right to have his pleadings amended, so as to conform to the proofs. *Tryon v. Sutton*, 13 Cal. 494.

**46. Substitution of pleadings.**—The substitution of papers (or pleadings in a case) is always within the discretion of the Court, and no notice of the motion to apply for it need be given, when the notice can be of no use. *Benedict v. Cozzens*, 4 Cal. 381.

**47. Amendments to answer.**—Where the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. *Angier v. Masterson*, 6 Cal. 61.

**48.** A joint claim by two persons cannot be pleaded as a counter claim by one defendant; but he may amend, and allege that the whole interest therein has been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

**49.** The fact that a proposed amended answer contains a positive denial of the allegations of the complaint, while the original answer only denies them on information and belief, is not an objection to allowing it. *Shanks v. Rae*, 19 How. Pr.; 18 Cal. 540.

**50. Bill of costs, amendment of.**—Under the sixty-eighth section of the Practice Act, the Court has power, in the exercise of its discretion, to allow the amendment of a bill of costs, and the affidavit accompanying it. *Burnham v. Hays*, 3 Cal. 115.

**51.** Where the original bill of costs is filed within the time prescribed by act, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part. *Id.*

**52. Fraud.**—Fraud discovered after suit brought will entitle the party to amend his action so as to include it. *Truebody v. Jacobson*, 2 Cal. 269; *Matoon v. Eder*, 6 Id. 61.

**53.** It would be proper for the Court to order the complaint to be amended in an action where the defendant is arrested, so that the question of fraud should be submitted to the jury, and a judgment entered in conformity to the facts found. *Matoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

**54. Garnishee may amend his answer.**—To subvert the purposes of justice, Courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake, or fallen into an error, which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 118.

**55. Limitations, Statute of.**—The plea of the Statute of Limitations is not favored, unless in aid of justice; but the Court should allow it to be pleaded at any time, when justice will be attained thereby. *Cooke v. Spears*, 2 Cal. 409.

**56.** It is not error for a Court to refuse permission to set up the Statute of Limitations after answering to the merits. *Stuart v. Lander*, 16 Cal. 372.

57. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial, permitted the other defendant to amend and file a separate plea of the statute: *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to reverse it. *Robinson v. Smith*, 14 Cal. 254.

58. **Referees.**—Referees have no power to allow parties to alter or amend pleadings, after a case has been referred to them. *De la Riva v. Berreyesa*, 2 Cal. 199.

59. **Sheriff's return.**—A Sheriff has no right, after making a return, to amend it so as to affect rights which had already vested in third parties. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 25.

60. **Summons may be amended.**—The Court may allow a summons to be amended by inserting the notice of the cause of action, etc., required by the Act of 1851. *Pollock v. Hunt*, 2 Cal. 193.

61. The defendants were administrators of the estate of A, and one of them was also executor of the estate of B. The plaintiff having a demand against the estate of A, directed his attorney to sue the defendants thereon, naming them by mistake as the representatives of B, and the summons issued accordingly: *Held*, that this was a mere misdescription of the representative capacity, and the Court had power to allow an amendment. *McElwain v. Corning*, 12 Abbott's Pr. R. 16.

62. A summons was issued in the Marine Court, in the name of Corydon, the given name of the plaintiff, his surname being omitted. On the return of process, all the parties appeared by attorney; and, on the motion of the plaintiff's attorney, the clerk amended the summons by inserting the surname, in pursuance of the direction of the presiding Justice: *Held*, that the amendment was within the power of the Court, and having done no harm to the defendant, was not ground of reversal. *Stanton v. Leland*, 4 E. D. Smith's C. P. R. 88.

63. **Warrant of attachment.**—The warrant of attachment issued under the Code as a provisional remedy, may be allowed to be amended by supplying the omission of the signature of the attorney. *Kissane v. Marshall*, 10 Abbott's Pr. R. 424.

64. **Judgment, within what time may be set aside.**—The District Court is not limited by the present act as to the time within which it may grant relief, upon a judgment unjustly or improperly obtained. *The People v. Lafarge*, 3 Cal. 130.

65. After the adjournment of the term, the Court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time: except in the single case provided by statute, where the summons has not been served, in which the party is allowed six months to move to set the judgment aside. *Carpentier v. Hart*, 5 Cal. 406.

66. No motion can be entertained by a District Court to set aside a judgment on any ground, including that of want of jurisdiction over the person of the defendant in the action in which the judgment was entered, after the expiration of the term in which it was entered, unless its jurisdiction is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act. *Bell v. Thompson*, 20 Cal.

67. A Court will not be permitted, after the lapse of a term, to open a judgment upon motion, and render a new judgment. *Morrison, Adm'r of Ramirez, v. Dapman & West*, 3 Cal. 255.

68. But if there is record evidence to show that the judgment was different from the one entered, the latter must stand until reversed. *Id.*

69. An order of Court setting aside a default and judgment entered during vacation is regular and correct, where there has been no service of summons upon the defendants. *Pico v. Carrillo*, 7 Cal. 30.

70. This proceeding is expressly authorized by the sixty-eighth section of the Practice Act, and it is not necessary to file a bill in chancery to vacate the judgment. *Id.*

71. **After final judgment reversed.**—When a final judgment, on demurrer to the complaint sustaining the demurrer, was reversed, the plaintiff had

the right to amend, on application to the Court below. *Williamson v. Blattan*, 9 Cal. 500.

72. **Default, when it will be set aside.**—A judgment by default will be set aside on the ground of fraud or surprise. *Bidleman v. Kewen*, 2 Cal. 250.

73. After two attempts to serve an answer, which failed by reason of plaintiff's office being closed, the clerk of defendant's attorney, to whom the duty of making service was committed, forgot it, and in the absence of defendant's attorney from town, the time for service elapsed: *Held*, that the Court should open the default; and an order refusing to do so was reversed on appeal, under a certificate according to rule of 1851. *Clark v. Lyon*, 2 Hilt. 91.

74. On opening, upon sufficient excuse, a default regularly taken against the defendant, the Court should not impose, as terms of the favor, a requirement that the defendant shall not interpose the defense of a former adjudication. *Audubon v. Excelsior Fire Ins. Co.*, 10 Abb. Pr. R. 63.

75. It is almost of course to open a default if the proposed defense is not clearly frivolous, is set up in good faith, and the neglect excused. *Commissioners of Excise v. Hollester*, 2 Hilt. 588.

76. **Amendment, nunc pro tunc.**—A Court may at any time render or amend a judgment *nunc pro tunc*, when the record discloses that the entry on the minutes does not correctly give what was the judgment of the Court. *Morrison, Adm'r of Ramirez, v. Dapman & West*, 3 Cal. 255.

77. In an action for libel, the complaint stated thirteen causes of action, to the sixth of which the defendant demurred, and to the others he answered. The plaintiff having recovered a verdict on the trial of the issues of fact, entered judgment. His judgment roll contained the whole complaint, and the demurrer to the sixth cause of action; but this issue of law had never been brought to trial. The defendant appealed from the judgment; and the plaintiff's points submitted on the argument of the appeal, stated that the sixth cause of action was abandoned on the trial. The plaintiff now moved that the judgment roll be amended by inserting, *nunc pro tunc*, an order that he take nothing by the sixth cause of action: *Held*, first, that the Court should from the facts deem the sixth cause of action to have been abandoned; second, that it was competent for the Court to allow such an amendment upon terms; third, that the condition imposed should be, that the plaintiff consent to allow an amendment which the defendant asked to have made in the case settled on the appeal, by the insertion of matters which occurred at the trial, and which were of sufficient importance to entitle him to be heard on them on appeal. *Fry v. Bennett*, 9 Abb. Pr. R. 45.

78. A purchaser at a judicial sale is not necessarily to be discharged on account of formal defects in the verification of a petition for the appointment of guardian for an infant defendant in the action in which the sale is decreed, or formal defects in the authentication of the verification; but such defects may be supplied by amendments, *nunc pro tunc*. *Rogers v. McLean*, 11 Abb. Pr. R. 440.

79. Where, in a partition suit, the names of certain defendants, through inadvertence, were omitted from the copy of summons filed: *Held*, that this was not conclusive that they had not been made parties; and they having been actually parties, the summons might be amended after judgment and sale. *Van Wyck v. Hardy*, 11 Abb. Pr. R. 473.

80. The Court has not power to amend a judgment, on motion, by qualifying its provisions in a respect in which there was no mistake, nor any omission of a direction which would have been inserted, as of course, if originally asked for. *N. Y. Ice Co. v. Northwestern Ins. Co.*, 11 Abb. Pr. R. 419.

81. The want of a verification by an infant defendant to his petition for the appointment of a guardian *ad litem*, may be allowed to be supplied after judgment; and it seems that the Court may dispense with such verification. *Van Wyck v. Hardy*, 11 Abb. Pr. R. 473.

82. **Statute remedy not exclusive.**—All Courts having chancery jurisdiction have power to set aside a judgment improperly obtained. *The People v. Lafarge*, 3 Cal. 130.

83. A party is not confined to his remedy by statute, but may resort to a Court of Equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 406.

**84. Judgment, form and sufficiency of the application to set aside.**—No particular form is required by the statute in which application shall be made for such relief. All that is required is, that the facts shall be set forth, and if they show a case coming within the rule, it is sufficient. *The People v. Lafarge*, 3 Cal. 130.

**85.** An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes but feeble ground upon which to base a motion to set aside a judgment. *Taylor v. Randall*, 5 Cal. 79.

**86.** An affidavit of merits, without any averment of mistake, surprise or excusable neglect, is not sufficient to warrant the setting aside a default, where personal service of summons was made. *Harlan v. Smith*, 6 Cal. 173.

**87.** An affidavit by defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default. *Elliott v. Shaw*, 16 Cal. 377.

**88. Judgments setting aside, discretionery.**—Where a judgment is set aside, under the sixty-eighth section of the Practice Act, and a party permitted to come in and defend, the Supreme Court will not interfere, unless there was a clear abuse of discretion in the Court below. *Roland v. Kreyenhagen*, 18 Cal. 455.

**89.** The refusal to set aside a judgment on the ground of surprise rests with the sound discretion of the Court below, and unless it is shown to have been an abuse of the same this Court will not interfere. *Mulholland v. Heyneman*, 20 Cal.

**90.** In setting aside a judgment, the Court below will use its own discretion, and this Court will not interfere, unless in case of gross abuse. *Woodward v. Backus*, 20 Cal.

**91.** In motions to set aside a judgment, it would be well to state the facts constituting the defense, rather than that the facts have been fully represented to counsel. *Id.*

**92. Confession, judgment by.**—A judgment by confession, founded on a defective statement, cannot be amended so as to sustain its priority over intervening judgment creditors. *McKee v. Tipson*, ante, 392.

**93. Judgment, should be corrected in the Court below.**—Errors in the computation of interest should be corrected by motion in the Court below. *Whitney v. Buckman*, 13 Cal. 536.

**94.** A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 Cal. 197.

**95.** A judgment will not be set aside, on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel, Bertheau & Co. v. Dukes*, 12 Cal. 479.

**96.** On appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate Court will not disturb the judgment, the defendant having his remedy in the Courts below within six months after judgment. *Guy v. Ide*, 6 Cal. 99.

**97. Records, Court may amend during the term, but not after an appeal is taken.**—While the term lasts, the Court has power to amend the records. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 173.

**98.** When a judgment is rendered and an appeal taken, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 134.

**99. Judgment, method of amending.**—The method of amending a judgment record by an obliteration or erasure, even when it leaves the passage legible, is not the proper mode. It should be by appending the order of amend-

ment to the roll, as well as by entering it in the proper book, and by referring in the margin of the entry of the judgment to an amendment as made by an order of such a date. The portions changed or omitted could be designated by brackets, underscoring, or otherwise. Or the judgment may be entered anew, as amended. 1 Russell's R. 476; 1 Swans. 573, n.; *Sluyter v. Smith*, 2 Bosw. 673.

100. **Costs, by whom paid.**—Where a judgment is set aside, under the sixty-eighth section of the Practice Act, and a party permitted to come in and defend, he must be compelled to pay costs. *Roland v. Kreyenhagen*, 18 Cal. 455.

§ 68. *Who may enlarge time to plead, correct mistakes, amend and relieve from judgment in certain cases.*

[1853.] The Court may, in furtherance of justice, and on such

Sec. 64. The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for an answer or demurrer, or demur to an answer filed. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, for any cause satisfactory to the Court or the Judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the Court, or the Judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. When, from any cause satisfactory to the Court or the Judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the Court, or the Judge at chambers in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

N. Y. Code, §§ 173, 174.

1. **Enlarging time to answer or demur.**—It is always within the power of a Court, when exercising proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes*, 5 Cal. 62.

2. Inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out and for judgment after the answer is filed. *Drum v. Whiting*, 9 Cal. 422.

3. Where a demurrer to a complaint is overruled, and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the Court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the Court must in a great degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice. *Thornton v. Borland*, 12 Cal. 438.

4. The power of the Court, under this and other sections of the Practice Act,

Amendment  
 Process April 2nd  
 1866 - 60 Days

should be liberally exercised to mould and direct its proceedings, so as to dispose of cases upon their merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. *Roland v. Kreyenhagen*, 18 Cal. 455.

5. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in Justices' Courts. *Butler v. King*, 10 Cal. 342.

6. Amendments to pleadings should be allowed with great liberality at any time before trial—injurious delays being avoided, and the amendment being essential to a fair trial on the merits. *McMillan v. Dana*, 18 Cal. 339.

7. Amendments should be liberally allowed by inferior Courts in advancement of justice, and to secure a fair and speedy trial on the merits, and an arbitrary refusal to allow them under proper circumstances would be ground of interference by the Supreme Court. *Smith v. Yreka Water Co.*, 14 Cal. 201.

### § 69. *Fictitious name.*

When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

N. Y. Code, § 175.

1. The Practice Act permits a party defendant, whose name is unknown, to be sued by any name. *Morgan v. Thrift*, 2 Cal. 562.

2. If a bond has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Id.*

3. The defendant was sued and served by the name of George Mott, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the Court to amend the judgment by altering the name of George to Gordon: *Held*, that this was error. *McNally v. Mott*, 3 Cal. 235.

4. Where a defendant is sued as James —, service was returned upon John —, and judgment was entered against J —: *Held*, to be error, unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

### § 70. *Pleadings, how constructed.*

In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties.

N. Y. Code, § 159.

1. Substantial justice spoken of in the statute is substantial legal justice, to be ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notion of equity which may be entertained by each individual. 1 Cal. 98.

§ 71. *No error or defect to be regarded, unless it affects the substantial rights.*

The Court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect.

N. Y. Code, § 176.

## TITLE V.

## OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I.—*Arrest and Bail.*

- SEC. 72. *No person to be arrested except as prescribed by this Act.*  
 73. *Cases in which defendant may be arrested.*  
 74. *Order for arrest, by whom made.*  
 75. *Affidavit to obtain order, what to contain.*  
 76. *Security by plaintiff before order of arrest.*  
 77. *Order, when made, and its form.*  
 78. *Affidavit and order to be delivered to the Sheriff and copy to defendant.* ◆  
 79. *Arrest, how made.*  
 80. *Defendant to be discharged on bail or deposit.*  
 81. *Bail, how given.*  
 82, 83. *Surrender of defendant.*  
 84. *Bail, how proceeded against.*  
 85. *Bail, how exonerated.*  
 86. *Delivery of undertaking to plaintiff, and its acceptance or rejection by him.*  
 87. *Notice of justification. New undertaking, if other bail.*  
 88. *Qualification of bail.*  
 89. *Justification of bail.*  
 90. *Allowance of bail.*  
 91. *Deposit of money with Sheriff.*  
 92. *Payment of money into Court by Sheriff.*  
 93. *Substituting bail for deposit.*  
 94. *Money deposited, how applied, or disposed of.*  
 95. *Sheriff, when liable as bail, and his discharge from liability.*  
 96. *Proceedings on judgment against Sheriff.*  
 97. *Motion to vacate order of arrest or reduce bail, affidavits on motion.*  
 98. *When the order vacated or bail reduced.*

§ 72. *No person to be arrested except as prescribed by this Act.*

\* No person shall be arrested in a civil action, except as prescribed by this Act.

§ 73. *Cases in which defendant may be arrested.*

The defendant may be arrested as hereinafter prescribed, in the following cases arising after the passage of this Act: \*

1st. In an action for the recovery of money or damages on a cause of action arising upon contract express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors, or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another.

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use,

\* Statutes of 1860, 407; Woods' Digest, 262, art. 1381.

*An Act for the Relief of Persons Imprisoned on Civil Process. Passed April 22d, 1860.*

1. Every person confined in jail, on an execution issued on a judgment rendered in a civil action, shall be discharged therefrom upon the conditions hereinafter specified.

2. Such person shall cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to the Judge of the District Court of the county in which such person may be confined; or, in case of his absence, or inability to act, to the Judge of the County Court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment.

3. Such notice shall be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application, in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing; and one day shall be added for every additional twenty miles that such person may reside from the place of hearing.

4. At the time and place specified in the notice, such person shall be taken before such Judge, who shall examine him under oath concerning his estate, and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such Judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or creditor.

5. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they shall, if required by him, be proposed and answered in writing; and the answer shall be signed and sworn to by the prisoner.

6. If, upon the examination, the Judge shall be satisfied that the prisoner is entitled to his discharge, such Judge shall administer to him the following oath, to wit: "I do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to defraud my creditors, so help me God."

7. After administering the oath, the Judge shall issue an order that the prisoner be discharged from custody, if he be imprisoned for no other cause; and the officer, upon the service of such order, shall discharge the prisoner forthwith, if he be imprisoned for no other cause.

8. If such Judge should not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings shall thereupon be had.

9. The prisoner, after being so discharged, shall be forever exempted from arrest or imprisonment for the same debt, unless he shall be convicted of having willfully sworn falsely upon his examination before the Judge, or in taking the oath before prescribed.

10. The judgment against any prisoner, who is discharged as aforesaid, shall remain in full force against any estate which may then, or at any time afterwards, belong to him; and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as if he had never been committed.

11. The plaintiff in the action may at any time order the prisoner to be discharged, and he shall not thereafter be liable to imprisonment for the same cause of action.

12. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, shall advance to the jailor, within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money should not be so advanced, or if, during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner, and the creditor should neglect, for twenty-four hours, to advance such further sum as might be necessary for his support, the jailor shall forthwith discharge such prisoner from custody, and such discharge shall have the same effect as a discharge by order of the creditor.



by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment; or for a willful violation of duty.

3d. In an action to recover possession of personal property, unjustly detained, when the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the Sheriff.

4th. When the defendant has been guilty of fraud in contracting the debt, or incurring the obligation for which the action is brought; or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5th. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

N. Y. Code, § 179.

1. No person can be imprisoned for debt, under the Constitution, except in cases of fraud. An assault and battery is not a case of fraud within the meaning of the Constitution. *Ex parte Prader*, 6 Cal. 239.

2. To entitle a party to the remedy of arrest, it is not necessary that he should know positively the commission of a fraud. It is sufficient, if the circumstances detailed would induce a reasonable belief that a fraud was intended. *Southworth v. Resing*, 3 Cal. 378.

3. **First subdivision.**—The seventy-third section of the Practice Act, which provides that "the defendant may be arrested where the action is for willful injury to person or character," is directly in conflict with the fifteenth section of article one of the Constitution. *Id.*

4. **Second Subdivision—Agent, when he can be arrested.**—In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest without such showing is prohibited by section fifteen, article one, of the Constitution. In the matter of *Holdforth*, 1 Cal. 438.

5. An agent who receives goods to sell on commission, who afterwards claims to have bought them from his principal, and on that ground refuses to account, or return the goods, may be treated as having converted them. *Solomon v. Waas*, 2 Hilt. 179.

6. An agent or attorney to whom money is paid by his principal for the purpose of making a specific appropriation of it, is liable to arrest on his refusal to pay it back on demand before he has paid it over. It is no excuse that the plaintiff has consented to its being held for a different purpose, unless the arrangement in respect to such purpose is such as to render the agent a stockholder under liability to retain it. *Schadle v. Chase*, 16 How. 413.

7. A being the owner of an invoice of goods in the city of New York, sold one-half interest therein to B, with an arrangement that the latter should proceed to San Francisco and there dispose of the same on joint account: *Held*, that this constituted a partnership between them, and that B was not subject to arrest in an action by A to recover a part of the proceeds of the sales. *Soule v. Hayward*, 1 Cal. 345.

8. Section seventy-four (now 73) of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another. *Id.*

9. The firm in which M. was a partner, received funds belonging to the plaintiff, from the plaintiff's agent, having been previously requested by the plaintiff to remit the same, when received, to him. They remitted a bill of exchange on a branch of their house, payable at sixty days after sight. The bill was accepted and delivered to the plaintiff, but the defendants failed before maturity, and the bill was unpaid: *Held*, that M. was liable to arrest in an action against the firm to recover the funds. *Bull v. Melliss*, 9 Abbott's Pr. 58; 13 Id. 241.

10. The defendants were factors—employed for a special purpose to take the plaintiff's money, and with it purchase sugar, to be shipped to the plaintiff at New York, and for no other purpose. And there was annexed to the contract a special condition that no part of the money should be used or employed for any other purpose by the said defendants: *Held*, that the defendants acted in a fiduciary capacity, [*Goodrich v. Dunbar*, 17 Barb. 646; *Stoll v. King*, 8 How. 300] and were liable to arrest in an action for a balance unpaid. *Noble v. Prescott*, 4 E. D. Smith, 139.

11. The plaintiff sent merchandise to the defendant to sell on commission; which the defendant sold, and received therefor \$2,228.51 over and above his commissions, which he neglected to remit to the plaintiff, and soon thereafter made an assignment of his property to a trustee for the benefit of his creditors; the plaintiff afterwards demanded the money of the defendant, and he refused to pay it over, having mixed and used the money with other moneys received by him in the business as a commission merchant, and having passed over to his assignee what money he had when he made his assignment, for the benefit of his creditors: *Held*, that the defendant received the funds in a fiduciary capacity, and was liable to arrest. Code, sec. 179; *Goodrich v. Dunbar*, 17 Barb. 646; *Schudder v. Shiells*, 17 How. 420.

12. The owner of promissory notes agreed to sell them to S., a note broker, and delivered them to him without receiving payment, but without agreeing to give credit. S., on the same day, transferred them to L., another note broker, who sold them and appropriated to his own use a large part of the proceeds: *Held*, in an action against both S. and L., that an order of arrest against L. ought not to be vacated. *Robbins v. Seithel*, 20 How. 366.

13. One who, in collecting a claim of his own, unites with it a claim belonging to another creditor, under an agreement with the latter to account to him for a due proportion of the amount collected, receives such proportion in "a fiduciary capacity," and is liable to arrest in an action for not paying it over. *Hall v. McMahon*, 10 Abbott, 319.

14. It seems that subdivision one of section one hundred and seventy-nine of the Code, so far as it mentions taking, detaining or converting property, refers to personal property only. *Brush v. Mullen*, 12 Abbott, 242. (For construction of the word "obligation," see 15 How. Pr. 48.)

15. **Fourth Subdivision.**—In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true. *Belden v. Henriques*, 8 Cal. 87.

16. Where a person, clearly insolvent, purchases goods from another on credit, and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale. *Seligman v. Kalkman*, 8 Cal. 207.

17. A defendant cannot be arrested for fraudulent representations in obtaining money, when there presentations were made some time after the money was obtained. *Snow v. Halstead*, 1 Cal. 361.

18. A fraud merely constructive, not involving moral guilt, is not ground of arrest. *Birchell v. Straus*, 8 Abbott, 53.

19. When concealment of insolvency may be fraudulent. Distinguishing *Nichols v. Pinner*, 18 N. Y. 295; *Brown v. Montgomery*, 20 N. Y. (6 Smith) 287, 293.

20. Circumstances on which one who, on a sale to him for cash, obtained a delivery and then induced the seller's agent to accept a worthless order in payment, was held liable to arrest. *Harding v. Shannon*, 20 How. 25.

21. A partner is not liable to arrest on the ground of fraud committed by his copartner in contracting the partnership debt on which the action is brought, in the absence of proof that he knew of such fraud, or that he in some way ratified the transaction. *Hanover Company v. Sheldon*, 9 Abbott, 240; *Wetmore v. Earle*.

22. In an action in the nature of an action on the case against partners for ob-

taining goods from plaintiffs by fraud, a partner who did not participate personally in the fraud is liable to arrest, as well as those who did. *Townsend v. Bogart*, 11 Abbott, 355.

23. An action for deceit in falsely representing the pecuniary liability of another party, is not a case in which defendant can be arrested on the ground of fraud in contracting the debt or incurring the obligation on which the action is brought, under subdivision four of section one hundred and seventy-nine of the Code. That provision relates to actions on contracts. *Smith v. Corbiere*, 3 Bosw. 634.

24. A person who purchases goods upon a credit obtained on the faith of his representation that he is solvent, when in fact he is not solvent, is not liable to arrest in an action therefor, if he believed his representations were true at the time he made them. *Birchell v. Straus*, 8 Abbott, 53.

25. Though a defendant would be civilly liable for the fraud of his agent, he is not liable to arrest therefor without personal guilt on his part in respect to the commission of the fraud, or by ratification of the fraudulent act. *Clayton v. Frank*, 8 Abbott, 412.

26. Where defendant, after having borrowed money on a promise to apply it to a specific use, converted it to another use: *Held*, that he was liable to arrest for a fraud in contracting the debt. *Lovell v. Martin*, 11 Abbott, 126.

27. The defendant, who was accustomed frequently to purchase from the plaintiffs for cash, bills of exchange for remittance to Europe in his business, becoming insolvent, procured them to sell him bills to a large amount upon credit, concealing his insolvency, though making no direct false representations as to his condition, or the use to which he should put them; and he then sold these bills in the market: *Held*, that the circumstances being such as to show that he purchased the bills with intention to make such use of them, and knowing his inability to pay for them, the purchase was fraudulent, and that he was liable to arrest in an action for their value. *Morrison v. Garner*, 7 Abbott, 425, 448.

28. Defendants, upon the faith of their explicit representations that their stock of goods was worth \$20,000, obtained on the last day of October a loan of \$10,000 from the plaintiffs, positively assuring them that this loan would prevent their failure. On the sixth of January following, they transferred their stock to plaintiffs on account of their indebtedness, representing the stock to be worth \$9,000; but after appraisement, they consented that plaintiffs should credit them with \$4,000 for it, and on a sale it brought even less. In an action to recover the remainder of the indebtedness, the plaintiffs caused the defendants to be arrested: *Held*, that they were not entitled to discharge from arrest in the absence of definite explanations as to the deficiency in the amount of property which they had. Without such explanation it must be inferred, either that they intentionally misrepresented the value of the property to get the loan, or afterwards made away with a large portion of the property with the design of defrauding their creditors. *Wilmerding v. Mooney*, 11 Abbott, 283.

29. The defendant's representations were as follows: "I am perfectly good and responsible for all the goods I may purchase; I own in I. the house and lots in which I am living, which I value at between five and six thousand dollars, and I consider this good and sufficient for any goods I may buy; I also own real estate in W., and I have other property." Within a month after he had repeated these representations, in another transaction with the same parties, he made an assignment for the benefit of creditors, which showed only \$1,607 assets: *Held*, in the absence of explanation on his part, evidence of fraud in contracting a debt on the faith of the first representations. *Scudder v. Barnes*, 16 How. 534.

30. **Fifth Subdivision.**—The offense of disposing of property to defraud creditors, committed in a foreign country between foreigners, does not render the fraudulent debtor liable to arrest in an action brought here by his creditor. *Blason v. Bruno*, 12 Abbott, 265.

31. To establish an intent to defraud creditors, it must appear that the defendant has property; that he has made, or is about to make, a fraudulent or illegal disposition of it, or that he unjustly refuses to apply it to the payment of his debts, or has secreted or removed it, or is about to do so, or has fraudulently encumbered it. *Townsend v. McDonald*, 32 Barb. 694.

32. The defendant in an execution—a foreigner—was informed by the officer who levied upon his property, that certain articles which, among others, he pro-

duced to the officer, were exempt from seizure on execution, and he thereafter removed them openly from the State: *Held*, that these circumstances did not amount to removing and secreting property with intent to defraud creditors, within the meaning of the nonimprisonment act. *Krauth v. Vial*, 10 Abbott, 139.

33. Circumstances of a transfer by the debtors of their stock of goods, which was held to be a fraudulent disposition of their property, which rendered them liable to arrest. *Phillips v. Benedict*, 12 Abbott, 355.

34. The fact that a debtor has made an assignment which, by reason of the omission of schedules and of other informalities, is to be deemed fraudulent and void as against creditors, etc., does not render him liable to an arrest at the suit of such a creditor, as having been guilty of a fraud, unless it is shown that he made the assignment with an actual fraudulent intent. *Birchell v. Straus*, 8 Abbott, 53.

### § 74. Order for arrest, by whom made.

An order for the arrest of the defendant shall be obtained from a Judge of the Court in which the action is brought, or from a County Judge.

N. Y. Code, § 180.

### § 75. Affidavit to obtain order, what to contain.

The order may be made whenever it shall appear to the Judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists; and that the case is one of those mentioned in section seventy-three. The affidavit shall be either positive, or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the Clerk of the county.

N. Y. Code, § 181.

1. **Writ of arrest.**—The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. *Matton v. Eder*, 6 Cal. 57.

2. As a matter of practice it is safest to award an arrest even in cases of doubt, for the defendant is protected by his bond from abuse by the process, without which process the plaintiff may be remediless. *Southworth v. Resing*, 3 Cal. 377.

3. The arrest upon affidavit is not intended to secure the presence of the defendant until final judgment. *Davis v. Robinson*, 10 Cal. 411.

4. To warrant arrest of a defendant whose fraud is alleged as the ground for the arrests, the fraud must be clearly proved. If there is a serious doubt as to the fraud, an order of arrest is not allowable. *Clafin v. Frank*, 8 Abbott, 412.

5. The fact that the plaintiff, in another action which has since been discontinued, caused the defendant to be arrested on an order which was absolutely void for want of authority on the part of the Court, does not preclude him from issuing another order in a second action, commenced for the same cause. *Schadle v. Chase*, 16 How. 413.

6. **Affidavit.**—The affidavit to sustain an arrest must show the facts relied upon by positive averment; and it is not sufficient to refer to the complaint, or to any other paper, to show what the affidavit ought itself to disclose. *McGilvery v. Moorhead*, 2 Cal. 607.

7. To entitle a party to the remedy of arrest, it is not necessary that he should show positively the commission of a fraud. It is sufficient if the circumstances

detailed would induce a reasonable belief that a fraud was intended. *Southworth v. Resing*, 3 Cal. 377.

8. An affidavit for arrest, which avers on information and belief that the defendant has been guilty of fraud in contracting the debt, or in endeavoring to prevent its collection, in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. *Matoon v. Eder*, 6 Cal. 57.

9. Insufficiency of the affidavit on which the writ of arrest issues cannot be set up in defense by third parties, nor even by the defendant himself after judgment. *Id.*

10. **Complaint.**—A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal.

11. It is necessary, in such a case, to charge not only that defendant received the money as agent, but that he converted it in the course of his employment as such. *Id.*

12. Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. *Id.*

13. Where the complaint was not filed until two days after an order of arrest had issued thereupon: *Held*, that the order of arrest was void. *Ex parte Cohen*, 6 Cal. 318.

14. **Judgment.**—To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

15. In cases of fraud, it appears that there can be but two judgments—one against the person, and the other against the property; in the former of which the execution issues directing the officer to arrest and confine the party until the debt is paid. *Matoon v. Eder*, 6 Cal. 60.

16. **Execution.**—See Sub. 3, sec. 210.

### § 76. *Security to plaintiff before order of arrest.\**

Before making the order, the Judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or free-

\* CHAPTER CCCXLIV.—Act to exempt the city and county of San Francisco from giving undertakings in certain cases. Stat. 1861, page 360.

Section 1. In any suit at law, or in equity, wherein the city and county of San Francisco is a party plaintiff or defendant, no bond, written undertaking, or security shall be required of said city and county, under the provisions of sections seventy-six, one hundred and two, one hundred and fifteen and one hundred and twenty-two of the Act entitled an Act to regulate proceedings in civil cases in the Courts of Justice in this State, passed April 29th, 1861, commonly called the "Civil Practice Act;" and of the Acts amendatory thereof and supplementary thereto, requiring of plaintiffs security in cases of arrest, replevin, injunction and attachments; but on complying with the other provisions required by law, the said city and county of San Francisco shall have the same rights, remedies and benefits, as if the undertakings, bond or securities were given and approved, as required by law in such cases.

holder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the Clerk of the Court.

N. Y. Code, § 182.

1. The obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole statute must be examined to determine their liability. *Mattoon v. Eder*, 6 Cal. 57.

2. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

3. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

4. Otherwise, also, as to joint and several bonds. There, each signer is bound, without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures were obtained. *Id.*

### § 77. *Order, when made, and its form.*

The order may be made to accompany the summons, or any time afterwards, before judgment. It shall require the Sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the Clerk of the Court in which the action is pending.

N. Y. Code, § 183.

### § 78. *Affidavit and order to be delivered to the Sheriff and copy to defendant.*

The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the Sheriff, who, upon arresting the defendant, shall deliver to him the copy of the affidavit; and also, if desired, a copy of the order of arrest.

N. Y. Code, § 184.

### § 79. *Arrest, how made.*

The Sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

N. Y. Code, § 185.

### § 80. *Defendant to be discharged on bail or deposit.*

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

N. Y. Code, § 186.

### § 81. *Bail, how given.*

The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the Court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

N. Y. Code, § 187.

### § 82. *Surrender of defendant.*

At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the Sheriff of the county where he was arrested.

N. Y. Code, § 188.

1. The sureties on the bail bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen v. Breslauer*, 8 Cal. 552.

2. A surrender, within ten days after execution, is a sufficient compliance with the statute.

3. Where a party offered to surrender himself in discharge of his sureties: *Held*, to be a good surrender, and a discharge of the sureties from all liability. *Babb v. Oakley*, 5 Cal. 93.

4. Where the judgment is not such as will warrant a writ of *ca. sa.* to be issued under it, the bail will not be charged for neglecting to surrender the judgment debtor. *Mattoon v. Eder*, 6 Cal. 57.

### § 83. *Surrender of defendant.*

For the purpose of surrendering the defendant, the bail at any time or place before they are finally charged may themselves arrest him; or by a written authority, endorsed on a certified copy of the undertaking, may empower the Sheriff to do so. Upon the arrest of the defendant by the Sheriff, or upon his delivery to the Sheriff by the bail, or upon his own surrender, the bail shall be exonerated; provided, such arrest, delivery, or surrender, take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender, be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

N. Y. Code, § 189; §§ 83 and 84 discussed.

§ 84. *Bail, how proceeded against.*

[1854.] If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

N. Y. Code, § 190; §§ 83 and 84 discussed; *Matoon v. Eder*, 6 Cal. 57.

§ 85. *Bail, how exonerated.*

The bail shall also be exonerated by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process.

N. Y. Code, § 191.

§ 86. *Delivery of undertaking to plaintiff, and its acceptance or rejection by him.*

Within the time limited for that purpose, the Sheriff shall file the order of arrest in the office of the Clerk of the Court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he shall retain in his possession until filed as herein provided. The plaintiff, within ten days thereafter, may serve upon the Sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the Sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the Clerk of the Court.

N. Y. Code, § 192.

§ 87. *Notice of justification. New undertaking, if other bail.*

Within five days after the receipt of notice, the Sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail, (specifying the places of residence and occupations of the latter) before a Judge of the Court, or County Judge, or County Clerk, at a specified time and place; the time to be not less than five, nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking.

N. Y. Code, § 193.

§ 88. *Qualification of bail.*

The qualifications of bail shall be as follows:



1st. Each of them shall be a resident, and householder, or freeholder, within the county.

2d. Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the Judge or County Clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

N. Y. Code, § 194.

§ 89. *Justification and allowance of bail.*

For the purpose of justification, each of the bail shall attend before the Judge or County Clerk at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the Judge or County Clerk in his discretion may think proper. The examination shall be reduced to writing, and subscribed by the bail if required by the plaintiff.

N. Y. Code, § 195.

§ 90. *Justification and allowance of bail.*

If the Judge or Clerk find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the Sheriff shall thereupon be exonerated from liability.

N. Y. Code, § 196.

§ 91. *Deposit of money with Sheriff.*

The defendant may, at the time of his arrest, instead of giving bail, deposit with the Sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the Sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

N. Y. Code, § 197.

§ 92. *Payment of money into Court by Sheriff.*

The Sheriff shall immediately after the deposit pay the same into

Court, and take from the Clerk receiving the same two certificates of such payment; the one of which he shall deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the Sheriff to collect the sum deposited as in other cases of delinquency.

N. Y. Code, § 198.

§ 93. *Substituting bail for deposit.*

If money be deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the Clerk, the money deposited shall be refunded by such Clerk to the defendant.

N. Y. Code, § 199.

§ 94. *Money deposited, how applied or disposed of.*

Where money shall have been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the Clerk shall, under the direction of the Court, apply the same in satisfaction thereof; and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the Clerk shall, under like direction of the Court, refund to him the whole sum deposited and remaining unapplied.

N. Y. Code, § 200.

§ 95. *Sheriff, when liable as bail, and his discharge from liability.*

If, after being arrested, the defendant escape or be rescued, the Sheriff shall himself be liable as bail; but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

N. Y. Code, § 201.

1. In an action against a Sheriff for the escape of a party in his custody under an execution against the body, it is not of itself alone a defense that the attorney of the plaintiff consented that such party might go to another place, out of the bailiwick of said Sheriff, in order to attempt to raise money with which to pay the judgment on which the said execution was issued. *Kellogg v. Gilbert*, 10 Johns. 220; *Dexter v. Adams*, 2 Denio, 646; *Gorham v. Gale*, 7 Cow. 744; *Benedict v. Smith*, 10 Paige, 127; *Thatcher v. d'Aguilar*, 11 Exch. R. 436; *Lovell v. Orser*, 1 Bosw. 349.

§ 96. *Proceedings on judgment against Sheriff.*

If a judgment be recovered against the Sheriff upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency as in other cases of delinquency.

N. Y. Code, § 202.

§ 97. *Motion to vacate order of arrest, or reduce bail and affidavits on motion.*

A defendant arrested may at any time before the justification of bail, apply to the judge who made the order, or the Court in which the action is pending, upon reasonable notice to the plaintiff to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

N. Y. Code, §§ 204, 205.

1. Where a party is once arrested and discharged, he cannot be arrested again in the same action. *McGilvery v. Moorhead*, 2 Cal. 607.

2. A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. *Soule v. Hayward*, 1 Cal. 345.

3. On a rule to show cause why the arrest of a party, ordered by the Court on an allegation of fraud, should not be vacated, the question of fact involved in it must be decided like any other fact, by the weight of evidence. *Southworth v. Resing*, 3 Cal. 378.

4. The defendant on arrest, by putting in bail and neglecting to move to be discharged, consents to process and waives all previous irregularities. *Matoon v. Eder*, 6 Cal. 57.

5. Where the right to arrest is derived from the nature of the action, the defendant cannot, on motion to discharge from arrest, introduce affidavits to show that no cause of action exists. 4 Abbott, 103; *Soloman v. Wans*, 2 Hilt. 179.

6. A purchaser who obtains credit by a false representation must be held to intend the legitimate consequence of his acts; and if he admits the false representation, his denial of intent to defraud is immaterial. So held on motion to vacate arrest. *Whitcomb v. Salsman*, 16 How. 533.

7. In an action for a conversion, an order of arrest is not to be vacated on mere denial of plaintiff's affidavits. *Causland v. Blise*; 4 Bosw. 619.

8. Where, on motion to vacate an order of arrest, the affidavit of the plaintiff positively and unequivocally alleges the making of false representations by the defendant, which the affidavit of the latter as unequivocally and positively denies, the defendant's affidavit should be regarded as neutralizing that of the plaintiff, who should be left to make out his case by other or further proofs. *Allen v. McCrassen*, 32 Barb. 662.

9. After a defendant has moved to vacate an order being founded on facts extrinsic to the cause of action, and his motion to vacate it being founded only on the plaintiff's original affidavits, if such motion is denied, he should not be allowed to renew it upon opposing affidavits on his own part, especially where the order denying his motion has been affirmed on appeal. *Lovell v. Martin*, 12 Abbot, 178.

10. An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party. *Webber v. Moritz*, 11 Abbott, 113.

11. An order of arrest should not be vacated on the ground that an action has been brought in a foreign Court against the defendant for the same cause, it not appearing that any arrest was ever made there, or would have been allowed by the practice of such Court. *Arthurton v. Dalley*, 20 How. 311.

12. On a motion to vacate an order of arrest, evidence of other concurrent frauds committed by the defendant is admissible as proof of the intent in committing the particular fraud charged. *Ballard v. Fuller*, 32 Barb. 68.

13. The provision of section two hundred and four of the Code of Procedure, allowing an application to vacate an order of arrest to be made on motion, requires a motion to the Court and upon due notice. *Rogers v. McElhone*, 12 Abbott, 292.

14. Upon an application to vacate an order of arrest, the question is whether the Court would, if called upon to act upon the application *res nova*, grant the order. *Allen v. McCrassen*, 32 Barb. 662.

### § 98. *When the order vacated or bail reduced.*

If upon such application it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

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## CHAPTER II.—*Claim and delivery of personal property.*

### SEC. 99. *Delivery of personal property, when it may be claimed.*

100. *Affidavit and its requisites.*

101. *Requisition to Sheriff to take and deliver the property.*

102. *Security on the part of the plaintiff and justification.*

103. *Exception to sureties and proceedings thereon, or on failure to except.*

104. *Defendant, when entitled to redelivery.*

105. *Justification of defendant's sureties.*

106. *Qualification and justification of sureties.*

107. *Property, how taken when concealed in building or inclosure.*

108. *Property, how kept. †*

109. *Claim of property by third person.*

110. *Notice and affidavit, when and where to be filed.*

### § 99. *Delivery of personal property, when it may be claimed.*

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time

before answer, claim the delivery of such property to him, as provided in this chapter.

N. Y. Code, § 206.

For complaint, see *ante*, page 71. For answer, see *ante*, page 96.

**1. Inducement, what is.**—In the action of detinue, the manner of laying the possession of the property has always been held to be inducement. It is usual to aver a bailment or finding. *Otero v. Bullard*, 3 Cal. 188.

**2. Fixtures, when personal property.**—By the wrongful severance from the premises, the fixtures become personal property, for the recovery of which an action of replevin will lie by the purchaser after he obtains the Sheriff's deed. *Sands v. Pfeiffer*, 10 Cal. 258.

**3. Bill in equity will lie to recover personal property.**—Where the recovery of the property is the primary object of the suit, as in some cases where damages will not compensate plaintiff, he should frame his bill in equity, specifying the reasons therefor, and then a decree can be made to compel specific delivery. *Nickerson v. Chatterton*, 7 Cal. 570.

**4. Object of suit in replevin.**—The primary object of the replevin suit is the recovery of the thing itself. The value is received only in the alternative that the property is not returned. *Hunt v. Robinson*, 11 Cal. 277.

**5. Jury, waived when.**—The failure of the defendant to appear on the trial of an action of replevin, when the cause is called, is a waiver of a jury under the one hundred and seventy-ninth section of the Code. *Waltham v. Carson*, 10 Cal. 180.

**6. Set-off, tort cannot be waived in.**—A claim for damages for the conversion of property is a demand arising in tort, and cannot, by waiving the tort and basing the claim upon an implied assumpsit to pay the proceeds, be made a claim arising on contract within the meaning of section one hundred and fifty of the Code relating to counter claims. *Mayor, etc., of New York v. Parker Vein Steamship Co.*, *ante*, 300.

**7. Action, when can be maintained.**—In trover, the plaintiff must either have the possession or the immediate right to the possession of the property, to entitle him to recover. *Middlesworth v. Sedgwick*, 10 Cal. 392.

8. A safe in the possession of McC. belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained \$6,000 in coin. Of this sum four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as Sheriff, under a writ against McC., seized \$1,800 of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: Held, that this amounted to a segregation of the \$1,800 from the mass of coin in the safe, so as to sustain replevin by plaintiff. *Griffith v. Bogardus*, 14 Cal. 410.

9. To render the defendant liable to the action, he must have converted the property to his own use; and if not, then any other act, to amount to a conversion, must be done with a wrongful intent, either express or implied. *Rogers v. Huie*, 2 Cal. 571.

10. In order to maintain an action for the recovery of goods fraudulently obtained from the plaintiff, where he has received nothing towards their purchase, and has, therefore, nothing to restore, all that is necessary to do to entitle him to reclaim his property, is to assert the right to rescind the contract for fraud, and to demand the goods. *Bliss v. Cottle*, 32 Barb. 322.

11. Such a demand, however, must be made before the commencement of the action, which cannot be maintained upon a demand involved merely in the commencement of the action itself. *Id.*

12. A subsequent ratification of a demand, made previously to suit brought, by one unauthorized to make it, is not sufficient to sustain the action. *Id.*

13. Where property comes lawfully into the defendant's possession, to entitle the plaintiff to recover its value it is necessary for him to show affirmatively a demand of it before suit brought, and a refusal to deliver, or that the defendant

had so disposed of the property that it was not in his power to deliver it. (Gra. Pr. 89; 1 Johns. Cases, 406; 6 Johns. 44; 3 Blackst. Com. 152.) But a demand and refusal, even, is no evidence, where it is apparent the defendant has made no conversion. Buller's N. P. 44; *Powers v. Bassford*, 19 How. Pr. 309.

14. The plaintiff, being the owner of goods in the possession of defendant, sold them to a third party, and received part payment, and, before any delivery to the purchaser, demanded possession from the defendant: *Held*, that the defendant's refusal to deliver possession was a conversion. Until the purchaser acquires an exclusive right of possession, the contract of sale is no defense to such an action by the vendor. *Minzekeimer v. Heine*, 4 E. D. Smith's C. P. R. 65.

15. Neither before nor since the Code, can an action in the nature of trespass or trover be maintained by the mortgagee of chattels, on account of the sale of them upon execution, against neither the officer nor the plaintiff in the execution, if, at the time of such sale, the mortgagor is entitled to remain in possession. To maintain such an action, the plaintiff must aver and prove that he had the actual possession, or right of possession, at the time of the alleged conversion. If, in such a case, the mortgagee has any remedy, it is only by an action founded on the special circumstances of the cases, setting forth the injury to his contingent interest in the property, and claiming damages therefor. Whether such an action can in any case be maintained, *Query?* *Goulet v. Asseler*, 22 N. Y. (8 Smith) 225.

16. In an action against brokers for selling, without authority, stock which they had purchased for the plaintiffs, at the plaintiffs' option, the complaint should show that the plaintiffs demanded the stock, and tendered the amount due therefor. *Clark v. Meigs*, 12 Abb. 267.

17. Where a tenant is dispossessed for nonpayment of rent by an officer, who, by the directions of the defendant, prevents him from removing his movable property, this is a conversion of such property on the part of the defendant. *Moore v. Wood*, *ante*, 393.

18. An agent who sues in his own name, upon a demand belonging to his principal, and uses for his own benefit the judgment recovered thereon, concealing the fact from his principal, is liable for the conversion in the amount of the face of the demand. *Sharp v. Whipple*, 1 Bosw. 557.

19. If an agent, intrusted with a security for collection, receives a transfer of property in payment of it, with the intention of applying such property to his own use, and concealing from his principal the fact that he has received it, and actually does so apply the property and conceal the fact, under pretense that nothing has been paid, he is guilty of a conversion, and the principal is entitled to recover the amount of the security with interest. *Ward v. Forrest*, 20 How. Pr. 465.

20. If one who has a lien on chattels refuses to deliver them on tender of the amount of the lien, it is a conversion. *Lamotte v. Archer*, 4 E. D. Smith's C. P. R. 46.

21. **Action, when it cannot be maintained.**—One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.

22. The complaint was for wrongfully taking, carrying away, and converting to the use of the defendants, personal property; and the relief demanded was a judgment for \$1,500, besides costs: *Held*, that the nature of the action was determined by the complaint, and particularly by the relief demanded, as an action for damages, and not to recover specific property; and that proceedings for claim and delivery were wholly unwarranted in the action, as such proceedings are confined to actions to recover the possession of personal property. *Seymour v. Van Curen*, 18 How. Pr. 94.

23. A Police Justice, without warrant, entered the premises of W., and finding several persons engaged in playing cards, arrested them on a charge of gambling, seized the gambling apparatus, and also several lewd pictures found upon the premises. The articles thus taken were placed in the custody of the property clerk of the Board of Metropolitan Police Commissioners; and W. brought an action against the clerk to recover their possession: *Held*, that they were in *custodia legis*, and no action would lie for their recovery. *Willis v. Warren*, 1 Hilt. 590; 17 How. Pr. R. 82. 100

24. **When demand is, or not, necessary.**—It is a general rule that

when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required. *Paige v. O'Neal*, 12 Cal. 483.

25. Where the original taking of personal property is tortious, no demand is necessary. *Ledley v. Hays*, 1 Cal. 160.

26. Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages. *Daniel v. Gorham*, 6 Cal. 43; *Taylor v. Seymour*, Id. 512; *Killey v. Scannell*, 12 Id. 73.

27. Demand not necessary to constitute a conversion, when defendant has wrongfully parted with possession. *Sharp v. Whipple*, 1 Bosw. 557.

28. **Evidence.**—Where the vendee replevied the goods from the attaching creditor, and only established title by proving a possession of several months, it was competent for the defendant in replevin, on cross-examination of plaintiff's witness, to ask in whose possession the chattels were at a certain period anterior to the possession proved by plaintiff, in order to draw from him, if possible, the fact that plaintiff's possession was a fraud to hide the debtor's property. *Thornburgh v. Hand*, 7 Cal. 554.

29. The declarations of a vendor of personal property, after the sale, not good to impeach the title of the vendee. *Visher v. Webster*, 8 Cal. 109.

30. Where, in an action to recover specific personal property, plaintiff relied exclusively upon his possession at the time of the taking by defendant; and defendant having first established a *prima facie* title sufficient to destroy the presumption of title in plaintiff arising from his possession, then went further, and showed—plaintiff excepting—that plaintiff obtained the property by proceedings under a void judgment: *Held*, that the introduction of this further evidence by defendant, showing the invalidity of the judgment, was of no advantage to him—as he had already rebutted plaintiff's case based solely on possession—and hence that it did not prejudice plaintiff, and is no ground of error. *Lafontaine v. Greene*, 17 Cal. 294.

31. **Damages.**—In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property, with interest. *Dorsey v. Manlove*, 14 Cal. 553.

32. In an action against a Sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owens*, 11 Cal. 22.

33. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Cal. 555.

34. **Judgment.**—In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 213.

35. In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative, as required by sections one hundred and four, one hundred and seventy-seven and two hundred and ten of the Practice Act. *Nickerson v. Chatterton*, 7 Cal. 568.

36. A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is, nevertheless, entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

37. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given by pleading his own misfeasance. *Turner v. Billagram*, 2 Cal. 522.

38. **Sheriff—defense by, how pleaded.**—In an action of replevin against a Sheriff, he must justify not only with the execution but with the judgment itself, whenever he takes property which is in the possession of a stranger to the writ; or in other words, whenever the stranger's possession is such as would prevent the debtor himself from retaking the possession. *Knox v. Marshall*, Jan. 1862.

§ 100. *Affidavit and its requisites.*

Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property, claimed, (particularly describing it) or is lawfully entitled to the possession thereof;

2d. That the property is wrongfully detained by the defendant;

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4th. That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution, or an attachment against the property of the plaintiff—or if so seized, that it is by the statute exempt from such seizure; and,

5th. The actual value of the property.

N. Y. Code, § 207.

§ 101. *Requisition to Sheriff to take and deliver the property.*

[1854.] The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, require the Sheriff of the county where the property claimed may be to take the same from the defendant.

N. Y. Code, § 208.

1. The Sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him. *Rhodes v. Patterson*, 3 Cal. 469.

§ 102. *Security on the part of the plaintiff and justification.*

[1854.] Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the Sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the Sheriff shall forthwith take the property



described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest post office, directed to the defendant.

N. Y. Code, § 209.

1. In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him is bad. *McDermott v. Isbell*, 4 Cal. 113.

2. Where the defendant, in a replevin suit, failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the Court rendered judgment against plaintiffs for costs, which was paid: *Held*, that the payment of the judgment, as taken, was a complete discharge of plaintiffs' sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390.

3. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignee of the defendants can maintain an action upon it. *Wingate v. Brooks*, 3 Cal. 112.

4. No recovery can be had on a bond purporting to be a joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

5. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

6. Where the plaintiff, in replevin, gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs: *Held*, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods; but not for damages for the original taking and detention—the value of the goods not having been found by the jury. *Guica v. Atwood*, 8 Cal. 446.

7. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff, H., as Sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking, as required by section one hundred and two of the Code. The undertaking was executed by defendants R. & S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the eighteenth of February, 1855, execution in favor of other creditors of J. coming into the hands of H., as Sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into Court. H. then brought this suit against the sureties in the replevin bond: *Held*, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 262.

8. The possession obtained by the plaintiff in replevin is only temporary. It does not divest the title, or discharge the lien. *Id.*

9. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Id.*

10. When the same property came into the hands of H. as Sheriff, the condition of the replevin bond, to return the property, was fulfilled. *Id.*

§ 103. *Exception to sureties and proceedings thereon, or on failure to except.*

The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the Sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the Sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

N. Y. Code, § 210.

§ 104. *Defendant, when entitled to redelivery.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the Sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and nine.

N. Y. Code, § 211.

1. This bond is assignable by the Sheriff. *Wingate v. Brooks*, 3 Cal. 112.

2. In an action on this bond, it must be alleged that the defendant neither redelivered the property, nor paid the value thereof, as recited in the judgment. *Nickerson v. Chatterton*, 7 Cal. 568; *Chambers v. Waters*, Id. 390.

3. In an action on a replevin bond, the defendant's liability is limited to the damages sustained by a failure to return the property. *Hunt v. Robinson*, 11 Cal. 262.

4. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Nickerson v. Chatterton*, 7 Cal. 560.

5. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Nickerson v. Chatterton*, 7 Cal. 568.

6. In an action against the sureties on replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. Id. 570.

7. A replevin bond was made to the Sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Turner v. Billagram*, 2 Cal. 522.

§ 105. *Justification of defendant's sureties.*

The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before a Judge or County Clerk, in the same manner as upon bail on arrest; and upon such justification, the Sheriff shall deliver the property to the defendant. The Sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

N. Y. Code, § 202.

1. In proceedings of claim and delivery, if the defendant elect to hold the property, the officer is still to retain it until the sureties justify, unless, indeed, he is willing himself to take the risk of such justification. The effect of a demand of the property by the defendant is not to entitle the defendant to have the property delivered to him, but to prevent a delivery of the property to the plaintiff. If the defendant would have the property himself, he must proceed to have his sureties justify in the manner provided in section two hundred and twelve of the Code. The time within which the defendant is to proceed to have his sureties justify is not limited. It is enough for plaintiff that the property is to be retained by the officer until such justification takes place, unless the officer chooses to make himself personally responsible that the sureties shall justify. *Graham v. Wells*, 18 How. 377.

2. Where, in an undertaking given in proceedings of claim and delivery, there were five sureties, and only three justified, and the aggregate amount of their justification was less than double the sum specified in the undertaking: *Held*, insufficient. *Id.*

§ 106. *Qualification and justification of sureties.*

The qualification of sureties and their justification shall be such as are prescribed by this Act in respect to bail upon an order of arrest.

N. Y. Code, § 213.

§ 107. *Property, how taken when concealed in building or inclosure.*

If the property, or any part thereof, be concealed in a building or inclosure, the Sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

N. Y. Code, § 214.

§ 108. *Property, how kept.*

When the Sheriff shall have taken property, as in this chapter

provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

N. Y. Code, § 215.

1. The property, a delivery of which was required, consisted of a cargo of coal, in a schooner lying at a wharf in an insecure place. The Sheriff served the papers on the defendant in possession, but left the coal there, where the vessel was afterwards sunk by a storm: *Held*, that the Sheriff was liable to the owner therefor. *Moore v. Westervelt*, 1 Bosw. 357.

2. Of the liability of the Sheriff for the safe keeping of the property in his custody. *Moore v. Westervelt*, 21 N. Y. (7 Smith) 103.

### § 109. *Claim of property by third person.*

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the Sheriff, the Sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the Sheriff against such claim, by an undertaking, by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the Sheriff, unless so made.

N. Y. Code, § 216.

### § 110. *Notice and affidavit, when and where to be filed.*

[1854.] The Sheriff shall file the notice, undertaking and affidavit, with his proceedings thereon, with the Clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein.

N. Y. Code, § 217.

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## CHAPTER III.—*Injunction.*

SEC. 111. *Injunction, what is and who may grant it.*

112. *When it may be granted.*

113. *At what time it may be granted, and what is required to obtain it.*

- 114. *Injunction after answer.*
- 115. *Security upon injunction. Damages, how ascertained.*
- 116. *Order to show cause why injunction should not be granted.*
- 117. *Injunction to suspend business of a corporation; how and by whom granted.*
- 118. *Motion to vacate or modify injunction.*
- 119. *When to be vacated or modified.*

§ 111. *Injunction, what is and who may grant it.*

An injunction is a writ or order requiring a person to refrain from a particular act. The order or writ may be granted by the Court in which the action is brought, or by a Judge thereof, or by a County Judge; and when made by a Judge may be enforced as the order of the Court.

N. Y. Code, § 218.

1. **Writ, form of.**—No particular form is necessary for a writ of injunction. The substantial thing is an authentic notification to the defendants of the mandate of the Judge, which they must then, at their peril, obey. *Summers v. Farish*, 10 Cal. 347.

2. **By whom it may be issued.**—There is no prohibition in the Constitution to this grant of authority to the County Judge, and the implication is decidedly in favor of its exercise. *Thompson v. Williams*, 6 Cal. 88.

3. The grant of authority to the County Judge, to award injunctions in cases brought in the District Court, is a mere power to issue mesne process auxiliary to the proper jurisdiction of the District Court, and is not trenching upon it. *Id.*

4. The granting an injunction by a County Judge on a bill filed in the District Court is auxiliary to the action of that Court, and has the same force and effect, for all intents and purposes, as if it were the direct act of the latter. *Crandall v. Woods*, 6 Cal. 449.

5. A County Judge, in granting an injunction upon a bill filed in the District Court, acts as an injunction master, and is exercising a power auxiliary to the jurisdiction of the District Court. The effect of such an order is the same as if made by the District Court, and the injunction is subject to be controlled, modified or dissolved by the District Judge, the same as if issued by his order in the first instance. *Borland v. Thornton*, 12 Cal. 440.

6. Granting and continuing injunctions rests very much in the sound discretion of the Court, to be governed by the nature of the case. *Hicks v. Michael*, 15 Cal. 107.

7. The Court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of. *Id.*

8. An injunction operates to restrain not only the party enjoined, but other Courts, on the ground of judicial comity. *Engels v. Lubeck*, 4 Cal. 31.

9. Abuse of the writ of injunction should be guarded against. *De Witt v. Hays*, 2 Cal. 463.

10. An injunction is never retroactive. It can never make an act unlawful, or a disobedience to its provisions, which was done before the injunction was granted. To convict of a contempt, it must satisfactorily appear either that the defendants, through themselves or their agents, have, since knowledge of the injunction, authorized the act prohibited by it to be done, or omitted to interfere to prevent a subsequent violation by a party who stood to them in the mere relation of an

agent or subordinate, whose movements they could legally control. *People v. Vermont and Albany R. R. Co.*, 11 Abb. 171.

11. **By whom it may not be issued.**—One District Court cannot, by injunction, restrain the execution of the orders or decrees of another Court of co-ordinate jurisdiction. *Ritkett v. Johnson*, 8 Cal. 34; *Revalk v. Kraemer*, 8 Id. 66; *Chipman v. Hibbard*, 8 Id. 268; *Phelan v. Smith*, Id. 520.

12. District Courts have no power to restrain the execution of the judgments or orders of Courts of co-ordinate jurisdiction. *Gorham v. Toomey*, 9 Cal. 77.

13. All proceedings to enjoin judgments must issue from the Court having the control of such judgments. *Id.*

14. Courts have no power to interfere with the judgments and decrees of other Courts of concurrent jurisdiction. *Anthony v. Dunlap*, 8 Cal. 26.

15. The only case in which it will be allowed is where the Court in which the action is pending is unable, by reason of its jurisdiction, to afford the relief sought. *Id.*

16. The only exception to the rule is where the Court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought. Where several fraudulent judgments are confessed in several Courts, it would not be necessary for a creditor to bring a different suit in each different Court. *Uhlfelder v. Levy*, 9 Cal. 607.

17. So, where the provisions of the Code require the action to be tried in a particular county, there would be an exception, as the positive provision of the statute must be carried out. *Id.*

18. The rule that one Court should not restrain the proceedings of another of co-ordinate jurisdiction, does not apply to prevent a plaintiff from seeking in one action to restrain the defendants from prosecuting several actions relating to the same subject matter, some of which actions are pending in other Courts. All may be restrained in one action brought in either Court. *N. Y. and New Haven R. R. Co. v. Schuyler*, 7 Abb. 239.

19. The Supreme Court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 107.

20. A State Court cannot enjoin the proceedings of a Federal Court. *Phelan v. Smith*, 8 Cal. 520.

21. **Generally.**—There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

22. **Query:** whether a tax-payer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect, at some future time, if certain other things be done, might be to subject his property to taxation? *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175.

23. Whether equity will enforce the specific performance of a contract depends not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law. *Duff v. Fisher*, 15 Cal. 375.

24. The granting and continuing of injunctions in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irreparable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured. *Hicks v. Compton*, 18 Cal. 206.

25. To authorize the interposition of a Court of Chancery to enjoin a judgment at law, on the ground of newly discovered facts, the proceeding must be taken by the defendant in the judgment at law. *Mulford v. Cohn*, 18 Cal. 42.

26. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of Court through malice, and without probable cause. *Robinson v. Kellum*, 6 Cal. 399.

27. If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond. *Id.*

### § 112. *When it may be granted.*

An injunction may be granted in the following cases :

1st. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2d. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff.

3d. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

N. Y. Code, § 219.

### INJUNCTION, WHEN IT WILL BE GRANTED.

1. **First subdivision.**—That portion of an act prescribing that no injunction shall be issued against the Commissioners appointed for the sale of the State interest within the water line is invalid. *Guy v. Hermance*, 5 Cal. 73.

2. The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of the Supreme Court. *Hickman v. O'Neal*, 10 Cal. 294; *Ford v. Rigby*, Id. 449.

3. Defendant, as Coroner and acting Sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: *Held*, that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

4. A ferry owner, prevented from obtaining a renewal of his license, either by the incompetency or refusal of the Supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the County Judge, within a mile of the first established ferry. *Chard v. Stone*, 7 Cal. 117.

5. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold. *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, 1 Cal. 464.

6. A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title. *Palmer v. Boling*, 8 Cal. 388, and *Fremont v. Boling*, 11 Cal. 387, overruling *Denio v. Hays*, 2 Cal. 463, and *Robinson v. Guar*, 6 Cal. 275.

7. Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for an injunction: *Held*, that the injunction could not issue, unless plaintiff averred the insolvency of defendant, and an inability to make the rent on attachment or execution. *Gregory v. Hay*, 3 Cal. 334.

8. A Sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson v. Jones and Bogardus*, 10 Cal. 9.

9. Such a sale would be a cloud upon the wife's title to the property, as the deed of the Sheriff would convey to the purchaser a *prima facie* title, which she would have to overcome by proof. *Id.*

10. In our Courts the rules and principles of equity practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction. *Minturn v. Hays*, 2 Cal. 590.

11. The jurisdiction of a Court to enjoin a sale of real estate is coëxtensive with its jurisdiction to set aside, and order to be canceled, a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the Court, that the deed casts a cloud over the title of the plaintiff. As in such case the Court will remove the cloud, by directing the cancellation of the deed, so it will interfere to prevent a sale from which a conveyance creating such a cloud must result. *Pizley v. Hug-gins*, 15 Cal. 127.

12. L. conveys real property by deed to the wife of M. for \$4,000, which sum is recited in the deed as the consideration. Subsequently M. and wife convey, by their joint deed, the property to plaintiff, for the consideration recited therein of \$9,500. This deed was acknowledged by both husband and wife, and of the acknowledgment two certificates were indorsed by the Notary, both of which were sufficient in form as to the acknowledgment of the husband, but only one of them was sufficient as to the acknowledgment of the wife: the other was defective. The deed was recorded with the defective certificate, the other being omitted. Later still, defendants, H. & H. recovered judgment against M., which was duly docketed, and became, from the time of its docketing, a lien on his property in the county in which was situated the property embraced in the deed from L. to M. and wife. Upon this judgment execution was issued, placed in the hands of the Sheriff, who levied it on the property in said deed, and advertised for sale all the right, title and interest which M. had therein at the time said judgment became a lien, etc. Plaintiff files his bill to enjoin this sale: *Held*, that an injunction lies; that the property acquired under the deed from L. to the wife of M. became community property, and as such was subject to the absolute disposition of the husband, and passed in full title to plaintiff under the deed to him. *Id.*

13. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise, not. *Id.*

14. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream, for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

15. No equitable remedy can be had for a mere past diversion of a water-course; but when the injury is continuing, relief may appropriately be sought in equity. *Id.*

16. When a party has given a promissory note, and the payee assigns the note, without recourse, after maturity, and suit is brought upon the note by the assignee, the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: *Held*, that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 97.

17. Where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled. *Shattuck v. Carson*, 2 Cal. 589.

18. So chancery, on like application, will interfere and prevent a sale, and the consequent execution of an improper deed. *Id.*

19. The right of homestead having once attached, and not having been alienated, a deed from the Sheriff, under an execution against the husband, would be a cloud upon the title, and prevent the free alienation of the property by the husband and wife. *Duan v. Tozer*, 10 Cal. 347.

20. Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterward fraudulently attached, in a suit brought by the real though not



ostensible purchaser, against the husband alone: *Held*, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 281.

21. A. leased furniture to B.; during the lease, F. bought the furniture of A., B. remaining in possession and acknowledging F.'s title. J., Sheriff, having an execution in favor of R. and against A., levied on the furniture as the property of A. F. thereupon filed his bill to enjoin the sale: *Held*, that the remedy by injunction is proper, as it is the only speedy, adequate and unembarrassed remedy the lessor has to vindicate his rights. *Ford v. Rigby and Irwin*, 10 Cal. 449.

22. The vendor of city lots required from the purchaser a covenant against the erection of any livery stable, etc., on the premises sold, and on his own part covenanted that no more than two houses should be erected on the residue of the land owned by him: *Held*, that the purchaser was entitled to an injunction restraining the vendor from erecting a livery stable on the residue. *Schenck v. Campbell*, 11 Abbott's Pr. 292.

23. In such a covenant, the word "house" may be understood as meaning "dwelling house." *Id.*

24. A clear violation of law, or a clear misuse or abuse of its corporate powers, by a municipal corporation, is an appropriate ground for an injunction, especially where the threatened act—the granting of ferry leases—is one of serious consequences to the public; would confer rights of property to last for years; and would thus present embarrassments in the way of their subsequently being set aside. In such a case, the preventive remedy is not only lawful, but the safest and best which can be adopted. *People v. Mayor, &c., of N. York*, 32 Barb. 102.

25. A railroad company may be compelled to continue their business by an injunction forbidding them to discontinue it. *People v. Albany and Vermont Railroad Co.*, 11 Abbott's Pr. 136.

26. Such an injunction may be granted at the suit of the people, if it is not shown that the discontinuance is necessary to avoid pecuniary loss. *Id.*

27. In an action by a stockholder to set aside a sale of the entire property of the corporation, an injunction should be granted, and a receiver should be appointed. *Abbott v. The Hard Rubber Co.*, 11 Abb. 204.

28. After the mortgage debt was over due, the mortgagor sent the mortgagee a draft for a part of the debt, saying he might use the draft if he would extend the time of payment of the residue for one year: *Held*, that the mortgagee having accepted the money but refused to be bound by the condition, the mortgagor might maintain an action to restrain foreclosure of the mortgage. He was not to be restricted to an action for damages. *Grinnan v. Platt*, 31 Barb. 328.

29. Where a nuisance occasions or is likely to occasion a special injury to an individual, which cannot be compensated in damages, it may be enjoined, at the suit of such individual. *Milhan v. Sharp*, 7 Abb. 220.

30. **Second Subdivision.**—Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold. *Henshaw v. Clark and one hundred and three Chinamen*, 14 Cal. 460.

31. An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection, to the owner, would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing. *Ritter v. Patch*, 12 Cal. 298.

32. In a complaint in ejectment parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste, pending the action; but the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

33. In cases of waste, if anything is about to be abstracted from the land which cannot be restored *in specie*, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Hicks v. Michael*, 15 Cal. 107.

34. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste, the commission of which a Court of equity will, upon petition, restrain. When once cut, the character of

the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it into whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot cite the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. *Halleck v. Mixer*, 16 Cal. 574.

35. A writ of injunction will lie, to restrain trespass in entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. *Merced Mining Co. v. Fremont*, 7 Cal. 317.

36. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Id.*

37. An injunction will not be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. *Waldron v. Marsh*, 5 Cal. 119.

38. An injunction ought not to be granted, unless equitable circumstances, beyond the mere allegation of irreparable injury, be shown—as insolvency, impediments to a judgment at law, or to adequate legal relief, or a threatened destruction of the property, or the like. *Burnett v. Whitesides*, 13 Cal. 156.

39. Where the plaintiff pretends no title to the soil, but only to a franchise, sale of the realty can work no irreparable damage, or throw a cloud on his title. *De Witt v. Hays*, 2 Cal. 463.

40. Where a bill avers that the plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent and threaten to, and will, enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiff's title, injunction lies. *Bensley v. The Mountain Lake Water Co.*, 13 Cal. 306.

41. Plaintiff takes up two hundred and twelve acres of land under the Possessory Act of this State, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sues for damages for the trespasses committed, and asks a perpetual injunction against future trespasses—verdict: "We the jury award the plaintiff forty-two dollars damages." Judgment accordingly—the Court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit: *Held*, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him. *Daubenspeck v. Grear*, 18 Cal. 443.

42. It is only where a threatened illegal or unconstitutional act of a municipal corporation—e. g., unlawfully filling up plaintiff's lots; or levying an illegal tax or assessment, will be productive of irreparable injury, or must lead to a multiplicity of suits, that an injunction will lie to restrain it. *Mayor of Brooklyn v. Meserole*, 26 Wend. 132; *Bouton v. City of Brooklyn*, 15 Barb. 375; *Mace v. The Trustees of Newburgh*; *Blake v. The City of Brookline*, 26 Barb. 301.

43. An individual owner of real property, upon the public street of a city, may maintain an action to enjoin the construction there of a railway, which would be a nuisance. *Milhan v. Sharp*, 7 Abb. 220.

44. Though it is a general rule that a temporary injunction will not be allowed in a case of doubt, yet where the defendant, under a doubtful claim, is about to do a permanent injury to real property, and the injunction will only work a transient injury to him, easily compensated in damages, it should be allowed, until the question is settled. *Rector, &c., of the Church of the Holy Innocents v. Keech*, 5 Bosw. 691.

45. **Third subdivision.**—Where suits have been commenced before a mag-

istrate against the drawers of prizes in a lottery, to forfeit the prize drawn to the State, under the statute, a bill for an injunction against the owner of the lottery, to restrain him from disposing of the prizes until the decision of those suits, will properly lie in the District Court. *People v. Kent*, 6 Cal. 89.

46. A Court of Equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted. *Heyneman v. Dannenberg*, 6 Cal. 376.

47. It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would, in the mean time, have passed to innocent purchasers on execution sale under the judgment. *Id.*

48. **Injunction, when it will not be granted.**—A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a Court of Chancery. *Merrill v. Gorham*, 6 Cal. 41.

49. The fact that the assessment for State and county taxes for 1855–6, in San Francisco county, was not based on the valuation of the City Assessor, as required by the act creating the Board of Supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the Board of Equalization if aggrieved. *Id.*

50. In all cases involving simply the question of taxation, the issue is strictly one at common law, and Courts of Equity can take no cognizance thereof; and in such case, to grant an injunction is error. *Minturn v. Hays*, 2 Cal. 590.

51. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages: *Held*, that the averments are insufficient to entitle plaintiff to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 148.

52. An injunction cannot be granted affecting the rights and interest of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued. *Patterson v. Yuba County*, 12 Cal. 105.

53. Where a party failed to obtain the proper certificate of the referee, relying on the verbal assurance of the attorney on the other side, that he would agree to a statement, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of a Court of Equity to enjoin a judgment obtained against him. *Phelps v. Peabody*, 7 Cal. 50.

54. Courts of Equity will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. *Id.*

55. Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the proper Court of law, Courts of Equity will not entertain a bill for an injunction on the ground that the original demand was unconscionous. *Id.*

56. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the Court, on the

ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee: *Held*, that this judgment of the Court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. *Allen v. Phelps*, 4 Cal. 256.

57. Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a Court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. *Weber v. The City of San Francisco*, 1 Cal. 455.

58. It seems that if the injunction bill had been filed before the work was commenced, the Court would have felt bound to inquire into the regularity of the assessment. *Id.*

59. If a tax upon the franchise has been illegally imposed, or a valid legal objection appears upon the face of the proceedings, the plaintiff has a perfect remedy at law, and a Court of Equity has no power to interpose. *De Witt v. Hays*, 2 Cal. 463.

60. If a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the Sheriff of the service of summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 200.

61. Where a party moves for a new trial and fails, he cannot on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 223.

62. If a judgment by default be void because entered by the Clerk without authority, that fact constitutes no ground for equity to interfere. *Chipman v. Bowman*, 14 Cal. 157.

63. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the Court issuing the writ. *Sparks v. De la Guerra*, 14 Cal. 108.

64. Courts of Equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. *Pico v. Suñol*, 6 Cal. 294.

65. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528.

66. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a Sheriff's deed: *Held*, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the Sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 Cal. 104.

67. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 496.

68. Where the Board of Supervisors of a county allowed an account presented for services as Tax Collector, and the Auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a *bona fide* purchaser, without notice: *Held*, that the county cannot go into equity to cancel the warrant and enjoin its collection as against M., on the ground that the account was false and

fraudulent as to some of its items, and was allowed by the Board through ignorance of the facts, and mistake; that the Supervisors were acting within the scope of their authority, and the county cannot visit upon an innocent party the consequences of their negligence. *El Dorado County v. Elstner*, 18 Cal. 144.—Cope, J.

69. An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title, as long as the purchaser against whom the judgment was taken and who seeks to enjoin it, remains in possession. *Jackson v. Norton*, 6 Cal. 187.

70. An order of injunction whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given. *King v. Hall*, 5 Cal. 82.

71. Where the Board of Supervisors of San Joaquin, under the Act of 1860, (Stat. 1860, 317) authorizing them to levy a special tax for the construction and repair of seven public highways leading from the city of Stockton, the fourth of which was "a road running from the limits of Stockton, via Hamilton's Ranch, known as the Sonora road," levied and collected the tax, and then, July 10th, 1860, passed an order locating the route of this fourth road, along which plaintiffs lived, and afterwards assessed the damages to the owners of land, etc., but before they had obtained the right of way for this road, passed another order in March, 1861, annulling the first order and changing the location of the road, which rendered the lands of plaintiffs of less value: *Held*, that the first order of laying out the road was unexecuted; that no rights of plaintiffs had vested, and that the Board had power to make the second order; that the first order was not in the nature of a power exercised and exhausted, but was at most a proposed mode of executing a power, which could be changed at any time before rights had vested under it. *Burkett v. Supervisors of San Joaquin*, 18 Cal. 702.

72. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where if the neglect were excusable, full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 440.

73. In this case, the Supreme Court refused to interfere with the discretion of the Court below, in denying an injunction sought by a settler upon public mineral lands, to protect his improvements—a dwelling house, milk house, barn, garden, dam, etc.—against miners who were working the bed of a ravine, a short distance in front of the house. See facts. *Stade v. Sullivan*, 17 Cal. 102.

74. Where, in suit before a Justice of the Peace, defendant answers, disputing plaintiff's claim, and afterwards, on a day set for trial—plaintiff being present, but defendant absent, and no one appearing for him—the Justice renders judgment for plaintiff, without evidence and "by default," as the docket reads: *Held*, that if the Justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error cannot be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon. *Hunter v. Hoode*, 17 Cal. 418; *Comstock v. Clemens*, 19 Id. 77.

75. Plaintiff has a deed of property from H. and P. Subsequently, N., execution creditor of H. and P., causes the Sheriff to levy on the property. Plaintiff files his bill to restrain the sale, as casting a cloud on his title. Court below found plaintiff's deed to be in effect a mortgage: *Held*, that the bill must be dismissed; that the purchaser at the Sheriff's sale would only acquire the interest of the judgment debtors, H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf. *Purdy v. Irwin*, 18 Cal. 350.

76. Per MURRAY, C. J., dissenting.—The plaintiffs' bill, alleging that the plaintiffs own the soil, and that the mine belongs to the State, by whose license the plaintiffs are working it, a trespass upon the mine, and the removal of auriferous quartz therefrom, is not an injury to the inheritance, and in order to obtain an injunction it must be shown that the injury is irreparable. *Merced Mining Co. v. Fremont*, 7 Cal. 317.

77. The fact that suit in ejectment has been commenced against the judgment debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. *Jackson v. Norton*, 6 Cal. 187.

78. Neither does the allegation that the purchaser (plaintiff in equity) has put

valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. *Id.*

79. An injunction sought in order to restrain a municipal corporation from passing a resolution or ordinance, refused. *Whitney v. Mayor, etc., of New York*, 28 Barb. 233.

80. The Court will not interfere to protect a party in the use of trade-marks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly or in part such trade-marks. *Hobbs v. Francais*, 19 How. Pr. 567.

81. A suit cannot be maintained in the Courts of this State to enjoin and restrain the prosecution of an action commenced and pending in a Court of a sister State. 2 Paige, 402; 2 Barb. Ch. 276; 4 Cranch, 179; 7 Id. 279; 2 Lead. Eq. Cases, pt. 2, 109; *Williams v. Ayrault*, 31 Barb. 364.

82. An injunction cannot be granted in an action between individuals to try the right to office in a religious corporation. The remedy is by an action in the nature of a *quo warranto*. *Hartt v. Harvey*, 10 Abb. 321.

83. In general, an injunction should not be granted to restrain the execution of summary proceedings to recover possession of land, except in case of undue advantage, fraud or surprise, to which the landlord is a party. *Marks v. Wilson*, 11 Abb. 87.

84. A grantor who has no longer any interest in the land cannot maintain an action to remove an apparent lien thereon, as being a cloud on the title, on the ground that he agreed with his grantee that he would procure the lien to be discharged. *Townsend v. Goelet*, 11 Abb. 187.

85. An injunction will not lie to eject a clergyman from his possession of the church, and to forbid his preaching in it, when he is rightfully in office by the act of the parish, and there is no other person who claims the office, or with whose rights as a minister of the parish he is interfering, and where there is no occasion for a breach of the peace, or a conflict between two clergymen or their adherents in the conduct of the worship of the congregation. *Youngs v. Ransom*, 31 Barb. 49.

86. Equity should not be appealed to to restrain the collection of a tax or assessment which was void. 14 N. Y. (4 Kern.) 534; 9 Paige, 388; *Mutual Benefit Life Ins. Co. v. Supervisors of New York*, 20 How. Pr. 416.

87. Whether an injunction will lie to restrain a breach of contract for personal services, *query*? *Fredericks v. Mayer*, 1 Bosw. 227.

88. Pending an action by the owner for the recovery of possession of certain personal property from the mortgagee's possession, and after he had taken proceedings of claim and delivery, and obtained possession thereby, the mortgagee of the property commenced an action against him to redeem the same: *Held*, that an injunction and a receiver should not be allowed. *Foot v. Sprague*, 12 How. Pr. R. —; 4 Id. 350; *Hunt v. Farmers' Loan Co.*, 8 Id. 416. The plaintiff should seek a settlement of the whole subject in the first action. 1 Seld. 363; *Dobson v. Pearce*, 2 Kern. 165; *Van Sant*. Pl. 505; *Arndt v. Williams*, 16 How. Pr. R. 245.

89. Where the object of the action is a permanent injunction, the Court should never grant a temporary injunction where they can see that no permanent injunction could be finally awarded on the facts alleged. *Durgan v. Hogan*, 1 Bosw. 645; 16 How. Pr. R. 164.

90. In the absence of undue advantage, fraud or surprise, the tenant cannot have an injunction to restrain summary proceedings to recover possession taken by his landlord against him. *Id.*

91. Nor can an assignee of the tenant, under an assignment for benefit of creditors, when he has never exercised any acts of ownership of the term which would make him liable on the lease, and who was made a party to the proceedings, and made no objection or defense thereto, have an injunction on the ground that no demand of the rent was ever made on him. *Bokee v. Hammersley*, 16 How. Pr. R. 461.

92. **Complaint, sufficient allegations.**—A complaint which joins an action of trespass, *quare clausum fregit*, with ejectment, and prays for an injunction, will be held bad on demurrer. *Bigelow v. Grove*, 7 Cal. 135.

93. In this case, it was held that the temporary injunction granted on filing the complaint should not have been dissolved before the hearing; that on the facts

stated in the complaint, an action for damages would be fruitless; that although the complaint does not aver absolute insolvency of defendants, still enough is averred to satisfy the Court that a judgment for damages would be worthless, and hence the injunction ought to have been continued. *Hicks v. Compton*, 18 Cal. 206.

94. To entitle a plaintiff to the equitable interposition of the Court, he must show a proper case, and one in which he has no adequate remedy at law. *De Witt v. Hays*, 2 Cal. 463.

95. The complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined; and asks for an injunction to restrain defendants from cutting and removing timber from the land—without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action: *Held*, that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases, to grant first a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 107.

96. Cutting, destroying and removing growing timber is sufficient ground for an injunction, without any allegations of insolvency. *Henshaw v. Clark and one hundred and three Chinamen*, 14 Cal. 460.

97. F., defendant, began suit against the Volcano Water and Mining Company, to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanic's lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one Harris, and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed, and in due time received the Sheriff's deed. Afterwards, F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues to quiet title, alleging that F.'s decree is fraudulent, that he had no lien, and that he is about enforcing the decree, which is a cloud on plaintiff's title: *Held*, that, aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title. *Head v. Fordyce*, 17 Cal. 149.

98. An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered, is a sufficient statement of title in suit for injunction to restrain trespass. *Hicks v. Compton*, 18 Cal. 206.

99. **Complaint, insufficient allegations.**—The simple allegation of "irreparable injury" is not sufficient; it should appear to the Court from the facts set forth in the bill. *De Witt v. Hays*, 2 Cal. 463.

100. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house on and occupied a portion of the tract; and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation: *Held*, that the plaintiff sets forth no principle on which to base a claim. *O'Connor v. Corbett*, 3 Cal. 370.

101. In a bill for partition among tenants in common and for injunction against cutting timber trees: *Held*, that defendants, being tenants in common, have the right to the enjoyment of the common estate, and to cut timber and use or dispose of it at least to an extent corresponding to their share of the estate; and that, as the complaint neither avers the insolvency of defendants, nor that they are exceeding this share, injunction does not lie. *Hihn v. Peck*, 18 Cal. 640.

102. *Query*: whether injunction would lie in such case, even if insolvency and excessive use of timber were averred. *Id.*

103. Where suit is pending in one Court on a note of defendant, though no summons has been served, and no appearance made, he cannot bring a bill in equity, in another Court, to enjoin the collection of the note, or to cancel it, the averment being, simply, that he has a good defense to the note. *Smith v. Sparrow*, 13 Cal. 596.

104. Bill for an injunction to restrain defendants from taking possession of certain real estate, a warehouse and wharf. Complaint avers plaintiffs' title to the

property, and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: *Held*, that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 202.

105. Where the complaint alleged that the defendants had a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: *Held*, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 340.

106. In a bill for an injunction, the mere allegation of great and irreparable injury to a vested right is insufficient; the facts stated must satisfy the Court that the apprehension of such injury is well founded. *Branch Turnpike Co. v. Board of Supervisors of Yuba County*, 13 Cal. 190.

107. Defendant, as Coroner and acting Sheriff, levied on, and advertised for sale, all the right, title and interest of T. in certain horses and cattle, in the hands of a receiver appointed in a suit between J. and T., as partners: *Held*, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 204.

108. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages: *Held*, that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

109. It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the Court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right. *Waldron v. Marsh*, 5 Cal. 119.

110. **Prayer of the complaint.**—Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction, to prevent future injury, is proper. *Marius v. Bicknell*, 10 Cal. 217.

111. A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct. *Gates v. Kieff*, 7 Cal. 125.

**Appeal.**—See *post*, § 336.

§ 113. *At what time it may be granted, and what is required to obtain it.*

The injunction may be granted at the time of issuing the summons upon the complaint; and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, shall show satisfactorily that sufficient grounds exist therefor. No injunction shall be granted on the com-



plaint, unless it be verified by the oath of the plaintiff, or some one in his behalf, that he, the person making the oath, has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true. When granted on the complaint, a copy of the complaint and verification attached shall be served with the injunction; when granted upon affidavit, a copy of the affidavit shall be served with the injunction.

N. Y. Code, § 220.

1. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint, in advance of the filing, to the Judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our statute. *Heyman v. Landers*, 12 Cal. 107.

2. In such case, the order does not take effect until the filing the complaint and the undertaking required. *Id.*

3. A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him. Giving him verbal notice that an order enjoining him has been made, is not sufficient. *Elliott v. Osborn*, 1 Cal. 396.

4. It seems if a party be in Court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby.—*Per Bennett, J. Id.*

5. An injunction order and due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order. *Id.*

6. The statute points out no mode for service of an injunction; but in conformity with the provision relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed. *Edmonson v. Mason*, 16 Cal. 386.

7. A writ placed in the Sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney v. Butterfield*, 13 Cal. 335.

8. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Hicks v. Michael*, 15 Cal. 107.

9. Where an injunction is granted on a verified complaint, service of a copy of the complaint with the injunction is service of a copy of the affidavit on which it was granted, within section two hundred and twenty of the Code. *Leffingwell v. Chace*, 10 Abbott, 472.

### § 114. *Injunction after answer.*

An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the Court or Judge granting or refusing the injunction.

N. Y. Code, § 221.

1. When the answer to a bill for an injunction denies all the equity, if any, of the bill, a preliminary injunction should not be granted. *Crandall v. Woods*, 6 Cal. 449.

2. On the return of an order requiring the defendants to show cause why an injunction should not issue, the defendants presented affidavits in opposition, and

affidavits were also read by the plaintiffs, rebutting, to some extent, the new matter set up by the defendants. After reading these papers, counsel for defendants claimed that as they appeared under an order to show cause why an injunction should not issue against them, they were entitled to open and close the argument on the hearing of the motion: *Held*, that an order to show cause should be considered as a notice for all the purposes of a motion, and did not at all affect the rights of the parties in respect to the manner in which they should be heard before the Court; that in cases of this kind the plaintiff should be regarded as the moving party, and as such entitled to open and close the argument. *N. Y. and Harlem R. R. Co. v. Mayor, etc., of New York*, 1 Hilt. 568.

§ 115. *Security upon injunction. Damages, how ascertained.*

On granting an injunction, the Court or Judge shall require, except where the people of the State are a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the Court finally decide that the plaintiff was not entitled thereto.

N. Y. Code, § 222. See *post*, § 650.

1. **When action will lie on the bond.**—Where suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the Court decides that such judgment was not fraudulent but valid: *Held*, that the effect of such judgment is, that plaintiff was not entitled to the restraining order. *Hayman & Co. v. Landers*, 12 Cal. 107.

2. The grounds of the injunction cannot be inquired into in suit upon an injunction bond. The Court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond. *Dowling v. Polack*, 18 Cal. 625.

3. A judgment dismissing a suit in which a temporary injunction had been granted for want of prosecution, amounts to a determination by the Court that the injunction was improperly granted; and after such judgment, suit lies upon the injunction bond. *Id.*

4. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

5. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

6. An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each of all of the obligees from damages or injury. *Summers v. Farish*, 10 Cal. 347.

7. Where there are several obligees in such an undertaking promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery. *Prader v. Purkett*, 13 Cal. 588.

8. An undertaking in such case, reciting that it is made in pursuance of the order of Court requiring a bond in the suit in which a restraining order was already in force, sufficiently expresses a consideration. The order for the bond and the undertaking must be given together. *Id.*

9. An injunction order is inoperative until the undertaking required by the statute be given. *Elliot v. Osborne*, 1 Cal. 396.

10. **Damages, how ascertained.**—A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages may be ascertained in the mode prescribed by the statute; and an order of reference is no violation of the constitutional right to trial by jury. *Russell v. Elliott*, 2 Cal. 245.

11. In an action for damages on an undertaking given on suing out an injunction, the defendants cannot object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance. *Cunningham v. Breed*, 4 Cal. 384.

12. Counsel fees for dissolving this order are recoverable on the bond. And this, though the fee was paid after August 29th, provided the retainer were before. *Prader v. Grim*, 13 Cal. 585.

13. The usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, in the "mean time," was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied and suit dismissed. Action on the bond: *Held*, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th. *Id.*

14. The Court may order a reference to ascertain the damages sustained by an injunction issued without cause. *Russell v. Elliott*, 2 Cal. 245.

15. The reference ordered upon an undertaking given on obtaining an injunction to ascertain the damages sustained by defendants, is for the purpose of fixing the measure, not the fact, of the liability of the obligors in the undertaking; and such an order should not be reversed on appeal, unless it is perfectly clear that no action will lie on the undertaking. *Carpenter v. Wright*, 4 Bosw. 655.

§ 116. *Order to show cause why injunction should not be granted.*

If the Court or Judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

N. Y. Code, § 223.

1. Even if a Chancellor has no power, under the one hundred and sixteenth section of the Practice Act, to require an undertaking upon the issuance of the restraining order, still, having taken jurisdiction of the general subject of litigation, he has power, aside from the statute, to order such undertaking, or to make any other order in the progress of the case, for the furtherance of the objects of the litigation and the protection of its subject matter. *Prader v. Purkett*, 13 Cal. 588.

2. The usual bond being given, an order was made to show cause (Aug. 29th) why an injunction should not issue. A restraining order, in the "mean time," issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied and suit dismissed. Action on the bond: *Held*, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th. *Id.*

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the Court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 Cal. 107.

4. Where, under the one hundred and sixteenth section of the Practice Act, an order is made to show cause why an injunction should not be granted, and restrain-

ing defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expired by limitation. *Id.*

5. An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. *Id.*

6. The object of the practice of issuing an order to show cause before granting the injunction, is to enable the parties to present the case on the merits. *Id.*

7. A discontinuance terminates an action to all purposes, and operates to dissolve an injunction. *Hope v. Acker*, 7 Abb. Pr. R. 308.

8. *It seems* that a dissolution of the injunction, followed by plaintiff's acquiescence by discontinuing, is a final determination, within the meaning of the undertaking. *Carpenter v. Wright*, 4 Bosw. 655.

### § 117. *Injunction to suspend business of a corporation—how and by whom granted.*

§ 117. An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the Court or a Judge thereof, and no Judge shall grant it without due notice of the application therefor to the proper officers of the corporation, except when the people of this State are a party to the proceeding.

State are a party to the proceeding.

N. Y. Code, § 224.

### § 118. *Motion to vacate or modify injunction.*

If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice, to the Judge who granted the injunction, or to the Court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted.

N. Y. Code, § 225.

1. Section three hundred and thirty-four of the Practice Act provides that an order made out of Court, without notice to the adverse party, may be vacated or modified without notice. The provision made in section one hundred and eighteen, that if an injunction be granted without notice, the defendant, at any time before trial, may apply, upon reasonable notice, to dissolve or modify the same, is not a substitution for the power conferred by section three hundred and thirty-four, but in addition to it. *Borland v. Thornton*, 12 Cal. 440.

2. Where an order granting an injunction is made *ex parte*, the injunction may be dissolved without notice. *Id.*

3. The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section one hundred and eighteen of the Practice Act. *Natoma Water & Mining Co. v. Parker*, 16 Cal. 83.

4. An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hearing. The only

remedy is to appeal from the order granting the injunction. *Natoma Water & Mining Co. v. Parker*, 16 Cal. 83.

5. The privilege of moving for a dissolution of an injunction upon the filing of an answer, is limited to cases where the injunction is originally granted without notice. *Henshaw v. Clark and one hundred and three Chinamen*, 14 Cal. 460.

6. Where the injunction is granted on a rule to show cause, it cannot be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. *Id.*

7. The injunction is a mere remedial process, and when the party obtaining it has also obtained judgment upon his cause, the Court will not revise the propriety of granting the writ. *Hicks v. Davis*, 4 Cal. 67.

8. The Court in which the objectionable order or decree exists, is the one to apply to for relief. *Rickett v. Johnson*, 34; *Revalk v. Kraemer*, 66; *Chipman v. Hubbard*, 8 Cal. 268.

9. Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted—the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found, generally, “for defendants, then moved to amend the judgment by adding thereto the words ‘and that the injunction heretofore granted be, and the same is hereby dissolved,’” which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer: *Held*, that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved. *Brennan v. Gaston*, 17 Cal. 372.

10. Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. *Gardiner v. Perkins*, 9 Cal. 553.

11. The entire equity of the bill in this case being denied in the answer, and there being no support of the bill, the injunction was dissolved. *Burnett v. Whitesides*, 13 Cal. 156.

12. Where an assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the city for the purpose of avoiding the payment of his portion of the assessment: *Held*, that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessment, leaving him, after the sale, to the technical rights which he set up by reason, as he claimed, of some irregularity in the mode of making the assessment. *Weber v. The City of San Francisco*, 1 Cal. 455, 119.

13. An injunction is not dissolved or superseded by appeal taken. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

14. Pendency of a motion for a new trial does not operate as a suspension of an injunction. *Ortman v. Dixon*, 9 Cal. 23.

15. Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants: *Held*, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. *Curtis v. Sutter*, 15 Cal. 263.

16. An injunction was granted on the complaint alone, and the defendant moved on his answer to dissolve it. The answer was verified, not by a party, but by the attorney, by an affidavit attached to the answer, in which he stated that he was acquainted with each and every of the matters and things set forth and alleged in the answer, and that all the matters set forth in the answer were true of his own personal knowledge: *Held*, that this was not only a verification, but should be deemed also an affidavit, within the provisions of section two hundred and twenty-six of the Code; and that plaintiff was entitled to oppose the motion by additional affidavits. *Minor v. Buckingham*, 8 Abb. Pr. R. 68.

17. When the defendant moves alone on his answer to dissolve an injunction, the plaintiff can read no affidavits in opposition to the motion; but if the defendant uses affidavits to move for a dissolution of the injunction, with or without his answer, the plaintiff may read additional or counter affidavits. *Blatchford v. N. Y. & New Haven R. R. Co.*, 7 Abbott, 322.

§ 119. *When to be vacated or modified.*

If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it shall be modified.

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CHAPTER IV.—*Attachment.*

SEC. 120. *Attachment, when and in what cases may issue.*

121. *Affidavit for attachment, what to contain.*

122. *Undertaking on attachment.*

123. *Writ, to whom directed and what to state.*

124. *Shares of stock and debts due defendant, how attached and disposed of.*

125. *How real and personal property shall be attached.*

126. *Attorney to give written instruction to Sheriff what to attach.*

127. *Garnishment, when garnishee liable to plaintiff.*

128. *Citation to garnishee to appear before a Court or Judge.*

129. *Inventory, how made; party refusing to give memorandum may be compelled to pay costs.*

130. *Perishable property, how sold. Accounts without suit to be collected.*

131. *When property claimed by a third party, how tried.*

132. *If plaintiff obtains judgment, how satisfied.*

133. *When there remains a balance due, how collected.*

134. *When suit may be commenced on the undertaking.*

135. *If defendant recover judgment, what the Sheriff is to deliver.*

136. *Proceedings to release attachment, before whom taken.*

137. *Attachment, in what cases it may be released and upon what terms.*

138. *When a motion to discharge attachment may be made, and upon what grounds.*
139. *When motion made on affidavit; it may be opposed by affidavits.*
140. *When writ shall be discharged.*
141. *When writ to be returned. To what debts these sections apply.*

§ 120. *Attachment, when and in what cases may issue.*

[1853, 1858, 1860.] The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided in the following cases:

1st. In an action upon a contract, expressed or implied, for the direct payment of money, which contract is made or is payable in this State, and is not secured by a mortgage, lien or pledge upon real or personal property; or if so secured, that such security has been rendered nugatory by the act of the defendant.

2d. In an action upon a contract, express or implied, against a defendant not residing in this State.

1. **Generally.**—It is well settled that the proceedings by attachment are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must strictly follow the provisions of the attachment law. *Roberts & Co. v. Landecker*, 9 Cal. 262.

2. The process of attachment is a creation of statute, and is a remedy only given in cases of indebtedness arising upon contract. *Griswold v. Sharp*, 2 Cal. 17.

3. The remedy by attachment is not a distinct proceeding in the nature of an action *in rem*, but is a proceeding auxiliary to an action at law designed to secure the payment of any judgment the plaintiff may obtain. *Low v. Adams*, 6 Cal. 277.

4. The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which are made in or are payable in this State. *Dutton v. Shelton*, 3 Cal. 206.

5. A writ of attachment is effectual to change the title of personal property only from the time of levy. *Taffs v. Manlove*, 14 Cal. 47.

6. In an action to recover damage for collision, there being no indebtedness arising upon contract, an attachment cannot issue. *Griswold v. Sharp*, 2 Cal. 24.

7. **By and against partners.**—Where one partner buys out his co-partners, agreeing to pay the debts of the firm, the partnership remains bound for firm debts just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 626.

8. A Sheriff having an attachment against V., may levy on his interest in the grain; and to effect this, may take and retain possession of the entire quantity of grain; but he can sell under the execution on the judgment that may be recovered in the action only the undivided one-third interest of V., the purchaser at the sale becoming tenant in common with B. *Bernal v. Hovious*, 17 Cal. 541.

9. The filing of a bill by one partner against his copartners for a dissolution

and account, and praying for an injunction and receiver, and an appointment of a receiver by the Court, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors until a final decree of dissolution and order of distribution. *Adams v. Woods & Haskell, T. A. Lynch, et al., Intervenor*, 9 Cal. 24.

10. **Creditor's bill.**—A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Conroy v. Woods*, 13 Cal. 626.

11. **Judgment.**—The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the Sheriff to sell it. *Low v. Henry*, 9 Cal. 538.

12. Unless the answer of a garnishee discloses heirs having priority of claim upon the funds in his hands, judgment must be rendered for the amount he admits is due. *Cahoon v. Levy*, 4 Cal. 244.

13. When the attachment will not lie and will be discharged, see § 138.

14. **Priority of attachments.**—Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. *Patrick v. Montader*, 13 Cal. 434.

15. Such a fund is not strictly an equitable asset. The prior attachments became liens in the nature of a legal estate vested in the Sheriff for the benefit of the creditors. Plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Id.*

16. The debt in such case is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the suit could have been defeated by the debtor himself. *Id.*

### § 121. *Affidavit for attachment, what to contain.*

[1853, 1858, 1860.] The Clerk of the Court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, showing:

1st. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counter claims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage, lien, or pledge, upon real or personal property.

2d. That the defendant is indebted to the plaintiff, (specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter claims) and that the defendant is a nonresident of the State.

3d. That the sum for which the attachment is asked is an actual *bona fide*, existing debt, due and owing from the defendant to plaintiff, and that the attachment is not sought, and the action is not



prosecuted to hinder, delay, or defraud, any creditor or creditors of of the defendant.

1. The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is "an actual *bona fide* existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor or creditors of the debtor," does not render the attachment issued a nullity as against subsequent attaching creditors. *Fredenberg v. Pierson*, 18 Cal. 152.

2. A junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor. *Id.*

3. A pledge of personal property is a "mortgage," within the meaning of the Attachment Act; the word being there used in its most general signification, meaning "security." *Payne v. Bensley*, 8 Cal. 260.

4. An affidavit for attachment is insufficient, which avers that the defendant is indebted to the plaintiff upon an express or implied contract. *Hawley v. Delmas*, 4 Cal. 195.

5. An action brought, not to recover a specific sum of money due or payable upon an express or implied contract, but to recover damages for the nonperformance of the covenants contained in a lease to work and till a farm in a good and workmanlike manner, is not an action brought "for the recovery of money," within the true intent and meaning of that phrase in subdivision one of section one hundred and twenty-nine, and in section two hundred and forty-six of the Code. (1 Code R. 126; 14 How. 454, 395.) *Cobb v. Dunkin*, 19 How. 164.

6. An action on an award for labor, etc., performed mostly in Canada, under contracts made, executed, delivered and payable there, by virtue of a bond of arbitration there made, and a submission there had, must be regarded as an action on a foreign debt; in other words, not a cause of action within this State, within the provisions of the Code relative to attachments against foreign corporations. *Campbell v. Champlain and St. Lawrence Railroad Co.*, 18 How. Pr. 412.

### § 122. *Undertaking on attachment.*

[1858, 1860.] Before issuing the writ, the Clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, with sufficient sureties to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

See § 650.

1. An attachment bond, executed after the writ has been levied and the attachment dismissed, is void. *Benedict v. Bray*, 2 Cal. 251.

2. In attachment, the undertaking should precede the writ and accompany the affidavit. *Id.*

3. It is no objection to an undertaking on attachment that it is made payable to the People of the State of California, instead of the defendant in the suit, as the latter can sue thereon in his own name. *Taafe v. Rosenthal*, 7 Cal. 514.

4. A mistake in the recital of the bond as to the amount for which attachment issued, may be explained and corrected by parol. *Palmer v. Vance*, 13 Cal. 556.

5. **Action on the bond.**—In an action on a bond given on suing out an attachment against the property of a debtor, who was a merchant, where the Sheriff had levied on no property except real estate: *Held*, that evidence as to the general effect of an attachment upon the credit and reputation of merchants ought not to have been submitted to the jury, on the ground that damages resulting therefrom are too remote and contingent; and *Held, further*, that counsel fees paid by the

attachment debtor in the defense of the suit commenced by the writ of attachment, over and above the taxable costs, were not reasonable, and that the District Judge erred in refusing, when requested, to instruct the jury to that effect, after having admitted evidence of the amount of such counsel fees. *Heath v. Lent*, 1 Cal. 410.

6. It seems that a verdict for \$3,000, in a suit on an attachment bond, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be deemed excessive, and reversed on that ground. *Id.*

7. In an action on an attachment bond, it is improper to admit evidence of depreciation in value of real estate attached.—Per Hastings, C. J. *Id.*

8. In a suit on an attachment bond, if the bond is void, the obligors cannot recover for injury sustained by the attachment. *Benedict v. Bray*, 2 Cal. 251.

9. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. *City of Sacramento v. Dunlap*, 14 Cal. 421.

10. Otherwise, as to undertakings under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *Id.*

11. Otherwise, also, as to joint and several bonds. There each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures were obtained. *Id.*

12. The bond given to release property attached only releases it from the custody of the Sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. *Low v. Adams*, 6 Cal. 277.

13. In an action on this undertaking, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson v. Blatten*, 6 Cal. 500.

14. The recitals in statutory undertakings have the same effect and are to be construed in the same way as bonds making the same recitals, and are conclusive of the facts stated. *McMillan v. Dana*, 18 Cal. 339.

See complaint, *ante* page 73. "Undertakings, statutory bonds and sealed instruments."

### § 123. *Writ, to whom and what to state.*

[1860.] The writ shall be directed to the Sheriff of any county in which property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; or in an amount equal to the value of the property which has been, or is about to be attached; in which case to take such undertaking. Several writs may be issued at the same time to the Sheriffs of different counties.

See § 650.

### § 124. *Shares of stock and debts due defendant, how attached and disposed of.*

The rights or shares which the defendant may have in the stock

of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

J. P.

1. Funds in the hands of a receiver, appointed by a competent Court, are not liable to attachment. *Adams v. Haskell*, 6 Cal. 113; *Yuba County v. Adams*, 7 Cal. 35.

2. Where an attachment was issued by the Court of first instance against the property of a debtor, and the Sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels and property of the debtor: *Held*, that the Sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person, for goods sold and delivered. *Sublette v. Melhado*, 1 Cal. 104.

3. Every sale of property and personal chattels is good between the parties, and cannot be attacked, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied, in whole or in part—with the single statutory exception of an attaching creditor, and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued, under the statute, before he can attack the sale. *Thornburgh v. Hand*, 7 Cal. 554.

4. For such a purpose the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ. *Id.*

### § 125. Writ, how executed.

[1862.] The Sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in section one hundred and twenty-three be not given, as follows:

1st. Real property standing upon the records of the county, in the name of the defendant, shall be attached, by leaving a copy of the writ with an occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the Recorder of the county.

2d. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, shall be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property, (giving a description thereof) and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the Recorder of the county, and leaving a copy of such writ and

notice with an occupant of such property, or if there be no occupant, by posting a copy thereof in a conspicuous place thereon.

3d. Personal property, capable of manual delivery, shall be attached by taking it into custody.

4th. Stock or shares, or interest in stock or shares, of any corporation or company, shall be attached by leaving with the President, or other head of the same, or the Secretary, Cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5th. Debts and credits, and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

J. P.; Property, what may be attached, see *post*, § 217.

1. **Writ, how executed.**—Where one writ of attachment was placed in the Sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the Sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the Sheriff was not guilty of negligence in executing the first writ—no special circumstances being shown. *Whitney v. Butterfield*, 13 Cal. 335.

2. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because the defendant is about to leave the State, or remove his property, and the like. *Id.*

3. The mere omission of a deputy to inform the Sheriff of having a process in hand is not such negligence as to charge the Sheriff, in case a writ last in hand was executed first. *Id.*

4. Where a substitute Sheriff (Elizor) was appointed, and the pleadings did not show that there was no Sheriff or Coroner, or that these officers were disqualified: *Held*, that the appointment being made by a Judge having competent jurisdiction, the presumption of the law is that he faithfully performed his duty. *Turner v. Billagram*, 2 Cal. 520.

5. No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the Sheriff under either writ, will discharge such Sheriff from liability. The statute is express that such instruction must be in writing. *Sandford v. Boring*, 12 Cal. 539.

6. A Sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in the course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Id.*

7. The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the Sheriff, who holds an execution against a third person, in levying it upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 575.

8. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached, is sufficient *prima facie* to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

9. Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. *Id.*

10. Nor is it necessary, when the levy is made by posting a copy of the writ on the premises, that the return of the Sheriff should show that the premises were at the time unoccupied. *Id.*

11. The return on an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection. *Webster v. Haworth*, 8 Cal. 21.

12. The levying of an attachment, at the suit of a creditor, upon goods which the creditor has converted, is equivalent to the return of the goods to the debtor. *Whittaker v. Merrill*, 28 Barb. 526.

13. An attachment, in so far as it relates to chattels, differs in nowise from an execution as to the rights and duties of the officer in levying it. *Goll v. Hinton*, 8 Abbott, 120.

14. Cases on the lien and priority of attachments collected. *Ante*, 379, note.

15. The rule as to the effect of a levy under an execution does not apply in its full extent to a levy under an attachment. *McBride v. The Farmers Savings Bank*, 7 Abbott, 347.

16. Where several attachments, issued under the Code of Procedure against the same defendant, are actually levied on the same property, the one first delivered to the Sheriff has priority, though it was the one last levied. *Yale v. Matthews*, 12 Abbott, 379.

17. A nonresident debtor having shipped goods to his factor within this State, a creditor issued an attachment, under the Code of Procedure, against the property of the debtor, and served the same on the factor after the bills of lading were received, but before the goods had come within the county. The factor at the time was largely in advance of the consignor, but he had in hands goods and notes received for goods sold, to an amount exceeding the attachment, the proceeds of which, together with the proceeds of goods represented by the bills of lading, which latter subsequently arrived, were more than enough to pay his balance. After the latter goods had arrived and the balance of account turned in favor of the debtor, another creditor issued a similar attachment, and served it upon the same factor: *Held*, that as between these creditors the first attachment was entitled to priority of payment. There was property of the defendant, in goods and notes, in the hands of the factor. The factor alone could assert his lien to the defeat of the attachment, and the amount of his lien having been subsequently paid, the surplus was left bound by the attachment. *Patterson v. Perry*, 10 Abbott, 82.

18. **Lien.**—T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H. as Sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same, by the delivery of an undertaking as required by section one hundred and two of the Code. The undertaking was executed by defendants R. & S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the eighteenth of February, 1855, executions in favor of other creditors of J. coming into the hands of H. as Sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into Court. H. then brought this suit against the sureties in the replevin bond: *Held*, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 262.

19. Plaintiff, January 10th, 1858, in a suit entitled C. & M. and others, composing the Wisconsin Quartz Mining Co. (a corporation) attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company, August 14th, 1858, the property sold and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure, August 9th, 1858. Sale October following—W. the purchaser. Defendants here are in possession under Sheriff's sale on the decree. Plaintiff claims title under his judgment and sale: *Held*, that he cannot recover; that he acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the

suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants' claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 398.

20. The deposit in the Recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ritter v. Scannell*, 11 Cal. 283.

21. Such lien cannot be divested by the failure of the Sheriff to make a proper return of the writ. *Id.*

22. A lien by attachment enables a creditor to file a creditor's bill, without waiting for judgment and execution. *Conroy v. Woods*, 13 Cal. 626.

23. The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the County Recorder. *Ritter v. Scannell*, 11 Cal. 238.

24. It follows that a garnishment served on the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of a subcontractor. *Cahoon v. Levy*, 6 Cal. 295.

25. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud had been discovered. The prior attachments became liens in the nature of a legal estate vested in the Sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 Cal. 444.

26. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 631.

27. The lien of an attachment having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successors. *Adams v. Woods*, 9 Cal. 29.

28. The lien of attachment of real property is not perfected until both the acts prescribed by statute, to wit: delivery to the occupant of a copy of the writ, or posting a copy upon the premises if there be no occupant, and the filing of a copy with the Recorder, together with a description of the property attached—are performed. The omission of either act is fatal to the creation of the lien. *Wheaton v. Neville*, 19 Cal. 41.

29. Where a writ of attachment was issued on the twenty-sixth of August, and a copy delivered to the occupant of the premises, or posted upon them, on the twenty-ninth of that month, and on the same day the writ was returned, with a certificate of the Sheriff's proceedings, and filed in the Clerk's office; but no copy of the writ, with a description of the property, was filed with the Recorder until the ninth of September following: *Held*, that after the return of the writ to the Clerk's office, on the twenty-ninth of August, the Sheriff had no authority to take any proceedings for the completion of the attachment, previously omitted; that the writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter, on the sixth of September, took it free from any lien of the attachment. *Id.*

30. It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. *Id.*

§ 126. *Attorney to give written instructions to Sheriff what to attach.*

Upon receiving information in writing from the plaintiff, or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the Sheriff shall serve upon such person a copy of the writ, and a notice that such credits, or

other property, or debts, as the case may be, are attached in pursuance of such writ.

J. P.

§ 127. *Garnishment, when garnishee liable to plaintiff.*

All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the Sheriff, liable to the plaintiff, for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

J. P.

1. The liability of a garnishee dates from the service of the attachment and affidavit, and from the notice to appear. *Johnson v. Curry*, 2 Cal. 33.

2. The ex-Sheriff could only be garnisheed as a private individual. *Graham v. Endicott*, 7 Cal. 144.

3. Where A, who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B a certain amount of money, with directions to B to pay the hands, which B neglected to do, and where there was no evidence showing that the hands agreed to look to B for their money, or that A was indebted to the hands in an amount equal or approximate to the sum in B's hands, and the money was subsequently attached in the hands of B at the suit of C against A: *Held*, that the money was liable to the attachment. *Chandler v. Booth*, 11 Cal. 342.

4. The lien of a subcontractor filed, and notice given to the owner of a building, within thirty days after the completion of the work, under the Act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor, after the work was commenced, and before the filing and serving notice of lien. *Tuttle v. Montford*, 7 Cal. 358.

5. The doctrine of garnishment, although partially regulated by statute, is not the less a common law proceeding, and therefore in proceedings against a garnishee, the parties are entitled to a jury trial. *Cahoon v. Levy*, 5 Cal. 294.

§ 128. *Citation to garnishee to appear before a Court or Judge.*

[1855.] Any person owing debts to the defendant, or having in his possession or under his control any credits, or other personal property belonging to the defendant, may be required to attend before the Court or Judge, or a referee appointed by the Court or Judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The Court or Judge may, after such examination, order personal property capable of manual delivery to be delivered to the Sheriff, on such terms as may be just, having reference to any liens thereon,

or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

J. P.

1. The provisions of the one hundred and twenty-eighth section were intended for the security of the plaintiff, and not to confer a privilege upon the garnishee, and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step. *Roberts & Co. v. Landecker*, 9 Cal. 262.

2. In proceedings against a garnishee, it is the duty of the Court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor. *Brumagin v. Boucher*, 6 Cal. 15.

3. An order that the garnishee pay over the money into Court is improper. *Id.*

4. An order requiring a garnishee to pay into Court the amount for which judgment has been rendered against him may be considered as improper. *Smith v. Brown*, 5 Cal. 118.

5. **Assignment, and its effects.**—Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: *Held*, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a *chose in action*, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the Statute of Frauds has no application to a case like this. *Walling v. Miller*, 15 Cal. 38.

6. A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Id.*

7. Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation. *Edwards v. Beugnot*, 7 Cal. 162.

8. In such a case, the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee. *Id.*

9. After the delivery and presentation of an order, the debt due by the drawee cannot be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order is an effectual protection, as it is also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee. *Wheatley v. Strobe*, 12 Cal. 92.

10. **Actions against garnishee.**—A garnishee cannot plead the pendency of the attachment suit in abatement of an action subsequently brought against him by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in the attachment, so long as proceedings by attachment are in force. The proper course is for the Court to order a suspension of the action against the garnishee by his creditor, until the attachment proceedings are disposed of. *McFadden v. O'Donnell*, 18 Cal. 160.

11. A garnishee should be allowed to amend his answer, whenever it appears that he has committed a mistake or fallen into error, which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 118.

12. A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by



reason of the illegality of the purpose for which it was deposited. *Hardy v. Hunt*, 11 Cal. 343.

13. The bailor does not part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. *Id.*

14. Nor can an attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it had been deposited by the bailee, claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailee by reason thereof. *Id.*

15. The stakeholder being informed of the rights of the bailor, was bound to protect those rights by resisting, in some way, the proceedings against him as a garnishee, the bailor being no party thereto; nor will he be protected by a judgment improperly entered against him, ordering him to pay the money to the attaching creditor. *Id.*

16. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property, and bring suit for the value of the property against the garnishee. *Roberts & Co. v. Landecker*, 9 Cal. 262.

17. A garnishee can only be required to answer as to his liability, to the debtor or defendant, at the time of the service of the garnishment. *Norris v. Burgoyne*, 4 Cal. 409.

18. Where B was garnished in a suit against C, the day before he accepted an order drawn by A in favor of C, but failed to inform C thereof; and C, for a valuable consideration, sold the order, as indorsed, to D, an innocent purchaser: *Held*, that B, having made the order negotiable, and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D for the full amount thereof. *Garwood v. Simpson*, 8 Cal. 101.

### § 129. *Inventory; how made, etc.*

The Sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt, or having the credit, to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amount and description of such debt or credit.

J. P.

### § 130. *Perishable property; how sold, etc.*

If any of the property attached be perishable, the Sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another

judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The Sheriff's receipt shall be a sufficient discharge for the amount paid.

J. P.

1. No order of Court is required to authorize a sale by the officer. *Low v. Henry*, 9 Cal. 551.

2. See *post*, § 654, as to the practice.

§ 131. *Proceedings where property is claimed by third persons.*

If any personal property attached be claimed by a third person as his property, the Sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in a case of a claim after levy upon execution.

See § 218 as to the law and practice. J. P.

1. Where property attached is claimed by a third person, the Sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives the bond of indemnity, it will only enure to the benefit of the owner of the property, so far as the consequences which result from his own acts are concerned. *Davidson v. Dallas*, 8 Cal. 227.

2. In such case, the attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first. *Id.*

§ 132. *If plaintiff recover judgment, how satisfied.*

If judgment be recovered by the plaintiff, the Sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1st. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or [of] any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2d. If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution.

J. P.

1. The application of an attaching creditor to compel the Sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the Sheriff to do so, if he wishes the decision to bind them. *Dixey v. Pollock*, 8 Cal. 570.

**§ 183. Balance remaining due, how collected.**

Court in which the action is pending, or to the Judge thereof, or to a County Judge, for an order to discharge the same, upon the execution of the undertaking mentioned in the next section; and if the application be granted, all the proceeds of sales and moneys collected by the Sheriff, and all the property attached remaining in his hands, shall be released from the attachment, and delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

J. P.

1. Where defendant in attachment applies to the Court, under sections one hundred and thirty-six and one hundred and thirty seven of the Practice Act, for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the Court makes an order discharging the writ and releasing the property: *Hed*, in suit against the sureties on the undertaking, that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the Court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. *McMillan v. Dana*, 18 Cal. 339.

§ 137. *Attachment, in what cases it may be released, and upon what terms.*

[1854.] Upon such application, the defendant shall deliver to the Court, or Judge, an undertaking executed by at least two sureties, residents and freeholders or householders in the county, to the effect that the sureties will, on demand, pay to the plaintiff the amount of any judgment that may be recovered in favor of the plaintiff in the action, not exceeding the sum specified in the undertaking, which shall be sufficient to satisfy the amount claimed by the plaintiff in his complaint, and the costs. The sureties may be required to justify, on such application before the Judge or Court, and the property attached shall not be released from the attachment without their justification, if the same be required.

J. P.

1. Where the Sheriff, under a writ of attachment in the suit of plaintiff against D. M. Eder and P. M. Eder, as the firm of D. M. Eder & Co., is about to levy upon the property of said firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the Sheriff against all damages, costs, charges, trouble and expense he may be put to by reason of the nonseizure of the property, and also "to pay whatever judgment may be rendered against said defendants;" and judgment was obtained against one only of the defendants,

plaintiff failing on the trial to prove the other to be a partner: *Held*, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. *Heynemann v. Eder*, 17 Cal. 433.

2. Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants." *Id.*

3. After the property of a defendant, which has been attached, has been discharged, pursuant to sections two hundred and forty and two hundred and forty-one of the Code, upon his giving an undertaking with two sureties, the Court has no power to require the defendant to procure additional sureties, upon the ground that the original sureties have become insolvent. *Dudley v. Goodrich*, 7 Abb. R. 26.

§ 138. *When a motion to discharge the attachment may be made, and upon what grounds.*

[1854, 1858, 1860.] The defendant may also, any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a County Judge, that the attachment be discharged, on the ground that the writ was improperly issued.

J. P.

1. The one hundred and thirty-eighth section of the Practice Act, which provides that the defendant may, at any time before answering, "apply, on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a County Judge, that the attachment be discharged, on the ground that the writ was improperly issued," does not obviate the necessity of specifying the particular points of irregularity upon which the motion will be made. *Freeborn, Goodwin v. Glazer*, 10 Cal. 337.

2. A notice of motion to discharge a writ of attachment, "because the said writ was improperly issued," is insufficient. The notice should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued. *Id.*

3. A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the Act of the twenty-ninth of April, 1851. *Dutton v. Shelton*, 3 Cal. 206.

4. The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. *Gregory v. Higgins*, 10 Cal. 339.

5. Nor can such indebtedness, after the maturity of the note, be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment upon the attachment. *Id.*

6. Where two shareholders in a joint stock company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A, and assigned their account for such goods to B, who sued such company on said account by attachment: *Held*, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. *Bullard v. Kinney*, 10 Cal. 60.

7. An attachment issued upon a debt not due, is void as against creditors whose rights are injuriously affected by it. *Davis v. Eppinger*, 18 Cal. 378.

8. An attachment issued before the maturity of the debt, is *prima facie* void as against a subsequent attachment. *Patrick v. Montader*, 13 Cal. 434.

9. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought. *Id.*

10. *Patrick v. Montader* (13 Cal. 434) goes upon the ground that the debt on which the attachment issued was *equitably due*, and hence, does not conflict with the rule laid down here. *Davis v. Eppinger*, 18 Cal. 350.

11. An attachment, issued before the issuance of the summons in the suit, is void, and the subsequent issuance of the summons cannot cure it. *Low v. Henry*, 9 Cal. 538.

12. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B. apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained, by an arrangement with G. & Co., an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co.: *Held*, that B.'s attachment and claim was valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Breaster v. Bours*, 8 Cal. 501.

13. Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it till next day, and after other attachment on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: *Held*, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. *Dixey v. Pollock*, 8 Cal. 570.

14. The fact that since the attachment has been levied the defendants have assigned their interest in the property attached for the benefit of creditors, does not affect their right to move for a discharge of the attachment for insufficiency in the papers on which it was granted. *Dickinson v. Benham*, 12 Abb. R. 158.

15. Although according to the practice in the First District, where a motion to vacate an attachment is made solely upon the insufficiency of the original papers, opposing affidavits to support the attachment are inadmissible—opposing affidavits are admissible so far as they relate to facts which have taken place since the original application was made, and are intended to show, not additional circumstances of fraud in support of the application, but a change in the relation and condition of the parties, which affects the right to make the motion. *Id.*

16. It seems that the fact that since the attachment has been levied, the defendants have assigned their interest in the property attached, does not affect their right to move for a discharge of the attachment for insufficiency in the papers on which it was granted. 10 Abb. R. 390.

§ 139. *When the motion is made on the affidavits, it may be opposed by affidavits.*

[1858, 1860.] If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the order of attachment was made.

J. P.

§ 140. *When the writ shall be discharged.*

[1858, 1860.] If, upon such application, it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

J. P.

§ 141. *When the writ is to be returned. To what debts these sections apply.*

The Sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as those suits may be concerned, the Act entitled "An Act to regulate Proceedings against Debtors by Attachment," passed April 22d, 1850, shall be deemed in full force and effect.

J. P.

1. The Sheriff's return is conclusive against the plaintiff, and his action must be for a false return. *Egery v. Buchanan*, 5 Cal. 53.

2. This return cannot be amended where a third party has acquired an interest adverse to the attachment. *Newhall v. Provost*, 6 Id. 85; *Webster v. Hawsorth*, 8 Id. 21.

3. A mistake in the date of a Sheriff's return may be amended at any time. *Ritter v. Scannell*, 11 Cal. 238.

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## CHAPTER V.—*Deposit in Court.*

SEC. 142. *Deposit in Court.*

143. *Appointment of receiver.*

§ 142. *Deposit in Court.*

When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs, or is due, to another party, the Court may order the same, upon motion, to be deposited in Court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the Court.

N. Y. Code, § 244, sub. 5.

§ 143. *Appointment of receiver.*

[1854.] A receiver may be appointed by the Court in which the action is pending, or by a Judge thereof:

1st. Before judgment, provisionally, on the application of either party, when he establishes a *prima facie* right to the property, or

to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired ;

2d. After judgment, to dispose of the property according to the judgment, or to preserve it during the pending of an appeal ; and

3d. In such other cases as are in accordance with the practice of Courts of Equity jurisdiction.

N. Y. Code, § 244.

1. **A County Judge cannot appoint, when.**—Under the statute, the County Judge may grant an injunction in cases in the District Court, but he cannot appoint a receiver ; at least, not a thing distinct from the injunction. *Ruthrauff v. Kress*, 13 Cal. 639.

2. Courts of Equity have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents ; and in proper cases, they can also order the defendant's agents or employes, although not parties to the record, to deliver the specific property to the receiver. *Ex parte Cohen*, 5 Cal. 494.

3. **Receiver, his powers and duties.**—A receiver may employ counsel. *Adams v. Woods*, 8 Cal. 315.

4. Upon the application of the receiver, in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held by the partnership against a third party, after paying the judgment creditor of the partnership. *Adams v. Hackett*, 7 Cal. 187.

5. Generally, a receiver can pay out nothing except on an order of the Court ; but there are exceptions to the rule ; nor will he be denied reimbursements in every case in which he neglects to obtain the order, especially in a Court of Equity. *Adams v. Wood*, 15 Cal. 207.

6. Where a receiver was authorized by order of the Court appointing him to prosecute suits for the recovery of assets of the estate he represents, and certain important mercantile books belonging to such estate being lost, the receiver paid \$1,127 for their recovery without an order of Court : *Held*, that he was entitled to a credit for that sum as part of the necessary or appropriate expenditure of his office. *Id.*

7. The plaintiff brought an action against a corporation and certain of its trustees, and obtained an injunction and an order for a receiver, referring it to a referee to appoint a suitable person. The trustees, who were defendants, appealed from this order and obtained a stay of proceedings, and meanwhile brought a suit against the same corporation and obtained the appointment of a receiver. The order for a receiver in the first action was subsequently affirmed, and the referee thereupon proceeded under the order and appointed a receiver : *Held*, that the latter appointment related back to the time of granting the order of reference, and gave the receiver so appointed a right to possession of the assets to the exclusion of the other. *Deming v. N. Y. Marble Co.*, ante, 66.

8. A receiver appointed in supplementary proceedings, having applied to the Court for leave to take and sell property of the judgment debtor, which was covered by a chattel mortgage not yet due, and leave having been refused, subsequently, by direction of the judgment creditor, took possession forcibly ; and pending an order to show cause why he should not return it, and restraining him from selling in the meantime, he sold the same in parcels without giving notice of the mortgage : *Held*, that the judgment creditor and the receiver were liable to the mortgagee in an action for the illegal taking and selling the property without recognition of plaintiff's rights for the amount of the debt and interest, with interest on the aggregate from the time it fell due. *Manning v. Monaghan*, 1 Bosw. 459.

9. **When a receiver should not be appointed.**—A Court of Equity has no jurisdiction over corporations for the purpose of restraining their operations



or winding up their concerns. Such Court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation; hence, in this case, it was error in the Court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Neall v. Hall*, 16 Cal. 148.

10. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another who may not be equally competent to manage the business. *Williamson v. Monroe*, 3 Cal. 385.

11. In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 Cal. 101.

12. A receiver should not in general be appointed in such case as to interfere with the rights of creditors having a legal or equitable lien upon the fund, under an executory contract, and the fact that under that contract they may yet become part owners, does not entitle the present owner to a receiver against them. *Field v. Ripley*, 20 How. Pr. 26.

13. In an action to recover possession of real property, with damages for the wrongful withholding thereof, it is not regular or proper to appoint a receiver of the rents and profits of the property in controversy. *Thompson v. Sherrard*, ante, 427.

14. The plaintiff cannot demand the appointment of a receiver of property in which he has no interest. *Smith v. Wells*, 20 How. Pr. 158.

15. That a receiver should not be appointed of property in another State, belonging to a person who has not been brought within the jurisdiction of the Court. *Field v. Ripley*, 20 How. Pr. 26.

16. The Court will not ordinarily take from a party the custody of his property without notice to him, and giving him an opportunity to show cause against it. A receiver will not be appointed upon an *ex parte* application before the appearance of the defendant, or until he has made default, after service of process, except in cases of emergency. *Id.*

17. **Appointment before judgment.**—To warrant the appointment of a receiver before judgment under the Code, both a *prima facie* right to the property which is the subject of the action, and which is in the possession of the adverse party; and also as matter of fact, that the property, or its rents and profits, are in danger of being lost or materially injured or impaired, must be shown. *People v. Mayor, etc., of New York*, 19 How. Pr. 289.

18. In an action for lands, where the plaintiff shows an apparent right, and the party in possession has no legal title, and the rents and profits are in danger of being impaired, a receiver may be appointed in the first instance. But where some of the defendants in possession are irresponsible, and before the commencement of the action the rents and profits were in danger of being lost, it is no answer to the application for a receiver, that since the commencement of the action the responsible defendants, who clearly have no title, have taken measures for their collection and preservation. *The People and Taylor v. Mayor, etc., of New York*, 8 Abb. 7.

19. One who is a necessary party to the action, is interested in the fund, and is entitled to be heard in regard to its custody and disposal, *pendente lite*, must be brought in and have notice before a receiver can, in ordinary cases, be appointed. *Field v. Ripley*, 20 How. 26.

20. **Creditors may attach after bill filed.**—In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared, and a receiver ordered to make a *pro rata* distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings and thereby gaining a preference. *Adams v. Hackett*, 7 Cal. 187; *Adams v. Woods*, 8 Id. 152; 9 Id. 24; *Naglee v. Laman*, 14 Id. 450.

21. **Fees, disbursements, etc.**—An order of Court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the Court," by a receiver or custodian of

money in the hands of the Court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. *Adams v. Haskell*, 6 Cal. 475.

22. And this, although the claim is for disbursements, etc., incurred by the custodian of the fund, under an appointment as assignee in a proceeding in insolvency, which was afterwards held to be void. *Id.*

23. Receivers or other custodians of money in the hands of a Court, who are receivers except in name, as they are bound to obey the orders of the Court in their relation to the fund, as well as regards its safe custody as its return, are co-relatively entitled to the protection of the Court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending. *Id.*

24. **Generally.**—Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. *Id.*

25. **Per TERRY, J.**—A fund in the possession of a receiver can only be distributed by the order of the Court in whose custody it is, and no party can, by adverse proceedings, acquire a lien over it. *Id.*

26. In this case it was error in the Court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Neill v. Hill*, 16 Cal. 145.

27. Such decree necessarily results in the dissolution of the corporation, and would be doing indirectly what the Court has no power to do directly. *Id.*

28. A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in *custodia legis*. *Adams v. Woods*, 8 Cal. 306.

29. The transfer to a receiver by order of Court of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decision of the Supreme Court, but only void against the claim of creditors. *Naglee v. Lyman*, 14 Cal. 466.

30. A creditor's action was commenced against the defendants, an insolvent firm, and then negotiations were had for a compromise with creditors, upon an understanding that the plaintiffs should not be prejudiced by the delay necessary. But meanwhile other plaintiffs commenced a second action for the same purpose, and obtained an order referring it to a referee to appoint a receiver. The defendants appealed from this order and stayed the plaintiff's proceedings thereon, and meanwhile suffered the plaintiff in the first suit to obtain a like order, from which they took no appeal, and thereupon a receiver was appointed in the first suit, who entered upon his duties. The plaintiffs in the second suit then moved to vacate or modify the order for a receiver in the first suit: *Held*, 1st, that the defendants having been guilty of no fraud or collusion, the order should not be vacated; 2d, that no objection being shown to the receiver actually appointed, the order should not be modified. The receiver is the officer of the Court, not the agent of the party; 3d, that the plaintiffs in the second suit were entitled to have been heard on the application for his appointment, and that they should be allowed to take an order so far opening the reference as to permit them to be heard on the subject, and that the referee inquire whether the receiver so appointed is a suitable person to be appointed receiver in both suits, and to hear and determine the objections of such last named plaintiffs to such receiver; and if the referee shall find that he is not a suitable person, then that he nominate to the Court a suitable person to be appointed in his place; and in the meantime, that all proceedings of both parties in the matter of such receivership, except the bearing of the appeal, be stayed. *Latimer v. Lord*, 4 E. D. Smith's C. P. R. 183.

## TITLE VI.

## OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.—*Judgment in general.*SEC. 144. *Judgment, definition of.*145. *Judgment may be for or against one of the parties.*146. *Judgment, may be against one party and action proceed on to the others.*147. *The relief to be awarded to the plaintiff.*148. *Action may be dismissed or nonsuit entered.*149. *Judgment on the merits, when.*§ 144. *Judgment, definition of.*

A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation.

N. Y. Code, § 245.

1. **Final judgment, what is.**—The correct rule appears to be that the words "*final judgment*" must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgments should finally decide upon the rights which are litigated. *Belt v. Davis*, 1 Cal. 138.

2. In this case, the whole scope and object of the suit was to vacate the judgment in a former suit, and procure a new trial therein, that being the point in issue. The District Court set aside the judgment, and granted a new trial: *Held*, that the order setting aside the judgment was a final judgment. *Id.*

3. The case of *Loring v. Illsley* (1 Cal. 28) explained. *Id.*

4. Every definitive sentence or decision of a Court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the appellate Court. *Id.*

5. Judgment having been obtained against A, who was master and one-third owner of a certain bark, for the sum of \$2,000, in the Court of First Instance, and his interest having been sold, and purchased by B: *Held*, that a further judgment, rendered in a subsequent proceeding, ordering that the possession of the bark should be delivered to B, was erroneous. *Held*, also, that such judgment is a final judgment, over which this Court has appellate jurisdiction, under the Act of February 28th, 1850. *Loring v. Illsley*, 1 Cal. 24; see *Belt v. Davis*, *Id.* 134.

6. When the Court has jurisdiction of the question and the parties, its judgment, whether legal or illegal, proper or improper, is valid and binding, until reversed or set aside. *Reynolds v. Harris*, 14 Cal. 678.

7. A judgment dismissing a suit, in which a temporary injunction had been granted, for want of prosecution, amounts to a determination by the Court that the injunction was improperly granted, and is in effect a final judgment against the defendant. *Dowling v. Polack*, 18 Cal. 625.

8. **Order, as contradistinguished from a final judgment, what is.**—As to what constitutes an order, see *Loring v. Illsley*, 1 Cal. 27, and *Belt v. Davis*, *Id.* 136.

9. It may be defined to be the judgment or conclusion of the Court upon any motion or proceeding. It means cases where a Court or Judge grants affirmative relief, and cases where relief is denied. *Gilman v. Contra Costa County*, 8 Cal. 57.

10. **Cannot be attacked collaterally.**—Where several persons were sued as members of a joint stock company, and the suit was discontinued as to B, one of the defendants, and judgment was taken against all the others, upon which execution was subsequently issued, and the property of one M., who was not a party to the suit, taken to satisfy the same: *Held*, that M. cannot, by a bill in equity against the plaintiff in the judgment, set it aside upon the ground that the discontinuance of the suit as to B. was a discontinuance as to all of the defendants. The judgment cannot be attacked in this collateral manner. *Markley v. Rand*, 12 Cal. 275.

11. The recital in a decree "that defendants had been regularly served with process, or had waived service by their acknowledgment," is sufficient evidence that the requisite proof was produced. In the absence of all evidence on this point, the presumption would be in favor of the jurisdiction of the Court, and of the regularity of its proceedings; and, for the want of such evidence, the decree cannot be impeached in a collateral action. *Alderson v. Bell and Wife*, 9 Cal. 315.

12. A decree cannot be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. *Id.*

13. Where a judgment was rendered by confession in open Court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment a nullity. *Cloud v. El Dorado County*, 12 Cal. 128.

14. A judgment can be attacked in any form, directly or collaterally, for want of jurisdiction, but only by a direct proceeding against the judgment, in the Court which rendered it, or in an appellate Court, upon appeal from the judgment, when there is an irregularity in procuring jurisdiction. *Whitwell v. Barbier*, 7 Cal. 64.

15. The true test in such cases is, whether the omission complained of is of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity. *Id.*

16. If a judgment is pronounced by a Court having jurisdiction, no matter how irregular it may be, it must stand, until set aside or reversed on appeal; but when entered by a mere ministerial officer without authority of law, it is void. *Stearns v. Aguirre*, 7 Cal. 448.

17. The Board of Supervisors of a county is a special tribunal with mixed powers, administrative, judicial and legislative, and jurisdiction over roads, ferries and bridges, is given to it by statute. Its judgments and orders cannot be attacked collaterally, any more than the judgments of Courts of Record. *Waugh v. Chaney*, 13 Cal. 12.

18. A decree of the Probate Court, ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, is final and conclusive, and cannot be assailed collaterally, nor directly, on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130; *State v. McGlynn*, 20 Id.

19. In suit in the District Court, on a bond given in the Court of Sessions for the appearance there of a party indicted for misdemeanor—the Court of Sessions having declared the bond forfeited for nonappearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

20. The judgment of the Supreme Court, being conclusive so long as it stands, cannot be attacked collaterally, on the ground that parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

21. **When it is, and is not, a bar.**—A judgment upon demurrer is not always a bar to a subsequent action. It is so only where it determines the merits of the case. *Robinson v. Howard*, 5 Cal. 428.

22. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim, and this averment is found to be true, as alleged, by the Judge at nisi prius, upon inspecting the record of the case, the judgment upon demurrer is a bar to the suit. *Id.*

23. A judgment of insolvency, where the Court had jurisdiction, if not reversed on appeal, is conclusive between the parties. *Kohlman v. Wright*, 6 Cal. 231.

24. A discharge in insolvency of a debt is equally a discharge of a judgment on that debt, and the costs, rendered between the time of filing the petition and schedule, and the time of final discharge. *Imlay v. Carpentier*, 14 Cal. 175.

25. To plead a former judgment in bar, it must appear, not only that it was upon the same action, but between the same parties. *Chase v. Swain*, 9 Cal. 136.

26. In a chancery case, when all the proofs are in, and the case fully before the lower and the appellate Court, the judgment of the latter is conclusive, where it passes upon the merits of the controversy; and on the reversal of the decree below, that Court can take no further proceedings, unless authorized by the appellate Court, except such as are necessary to give effect to its judgment. The whole matter is *res adjudicata*. *Soule v. Dawes*, 14 Cal. 249.

27. A judgment rendered upon a complaint radically defective, may be treated as a nullity. *Reynolds v. Harris*, 9 Cal. 338.

28. **Power of the Court over judgments.**—In this State, no motion can be entertained by a District Court to set aside a judgment on any ground, including that of want of jurisdiction over the person of defendant in the action in which judgment was entered, after the expiration of the term in which it was entered, unless the jurisdiction of the Court is saved by some motion or proceeding at the time, except in the case provided for by the sixty-eighth section of the Practice Act. *Bell v. Thompson*, 19 Cal. 706; *Suydam v. Pücker*, 4 Id. 280; *Shaw v. McGregor*, 8 Id. 521.

29. A Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for new trial were taken under advisement. *Hutchinson v. Bours*, 13 Cal. 50.

30. **Validity and force, where no jurisdiction over the person.**—A personal judgment of a Court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the Court had acquired no jurisdiction over the person of the defendant. *Whitwell v. Barbier*, 7 Cal. 63.

31. A judgment void for want of personal jurisdiction, is not cured by the appearance of the party for the purpose of vacating it. *Gray v. Hawes*, 8 Cal. 568.

32. **As between parties and privies.**—A judgment is of no force, except between the parties and privies. *Beckett v. Selover*, 7 Cal. 228.

33. A judgment record is only conclusive between the parties and their privies, except in some cases for specific purposes. *Davidson v. Dallas*, 8 Cal. 227.

34. A purchaser of land, subsequent to a suit brought against his vendors to quiet title, and to a notice of *lis pendens* filed in the County Recorder's office, is a mere volunteer, who takes subject to any decree in the suit. *Gregory v. Haynes*, 13 Cal. 494.

35. **Alteration without notice.**—An alteration of a judgment by the Court, without notice, so as to include a party not served with process, if not void, is voidable, at the election of the party. *Chester v. Miller*, 13 Cal. 561.

36. Where the Court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the Court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 161.

37. **Judgment, how entered.**—Where, in a suit to enforce a verbal contract for the sale of land—the complaint averring a balance of four hundred dollars to be due defendant when he should make a deed, and describing the land by its position with reference to adjoining tracts—a demurrer was put in, and being overruled, and defendant not answering, final judgment, by default, was entered for plaintiff—evidence being taken as to the contract by the referee—that plaintiff pay defendant three hundred dollars, the latter to make a deed of the land, which was described in the judgment by metes and bounds: *Held*, that the judgment is erroneous, both as to the amount adjudged due defendant and in describing the land by *metes and bounds*; that the judgment should have followed the complaint

in both these particulars, and that the departure is material and fatal. *Holman v. Vallejo*, 19 Cal. 498.

38. If the verdict of the jury fails to find the lien, the Court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. Hauss Hijo*, 1 Cal. 186.

39. Where a man is sued by a fictitious name, and the return of the Sheriff on the summons shows service on the defendant by his proper name, as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 117.

40. To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint, and be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 411.

41. **Judgment should be entered at once, when.**—Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial. *Hutchinson v. Bours*, 13 Cal. 51.

42. A suspension of all proceedings under the judgment fully protects the losing party from all loss or injury, if from any cause the verdict be set aside or the judgment vacated. *Id.*

43. **Judgments entered in vacation.**—Where the Supreme Court reverses the judgment of a District Court, and directs the entry of a final judgment, such judgment can be entered by the Clerk of the District Court in vacation. *McMillan v. Richards*, 12 Cal. 467.

44. **After appeal, the Court below loses control over the judgment.**—Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 135.

45. **Presumptions in favor of Courts of general jurisdiction, etc.**—The presumption in favor of a judgment of a Court of general jurisdiction is overthrown, when the record of the entire case discloses a want of jurisdiction. *Id.* 569.

46. The appellate Court will presume in favor of the judgment of the Court below, unless the record clearly show error. *Thompson v. Manrow*, 2 Cal. 100; *Kilburn v. Ritchie*, 2 Id. 148; *White v. Abernathy*, 3 Id. 426; *Johnson v. Sepulveda*, 5 Id. 151; *Grewell v. Henderson*, 7 Id. 292; *Nelson v. Lemmon*, 10 Id. 50.

47. **Effect of reversal of judgment.**—Where an execution on a judgment for the recovery of money is not stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

48. If on sale under judgment, the plaintiff or his assignee buys in the property, he must restore it to the defendant on reversal of the judgment; otherwise, as to a stranger, a *bona fide* purchaser without notice. *Reynolds v. Harris*, 14 Cal. 680.

49. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterward reversed. *Id.*

50. **Identity of judgments.**—A judgment was obtained against one John P. Manrow, in the city of New York, and an action was brought upon a judgment against one John P. Manrow, in the city of San Francisco; the identity of the person was held to be presumed. *Thompson v. Manrow*, 1 Cal. 428.

51. **Attorney has no lien on a judgment.**—The attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Manfield v. Dorland*, 2 Id. 509; *Russell v. Conway*, 11 Id. 103.

52. **Interest on judgments.**—A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 8 Cal. 32.

53. Interest is not recoverable on a judgment in another State, without proof that the law of such State allows interest on judgments; at common law, judgments do not carry interest. *Thompson v. Manrow*, 2 Cal. 100; *Cavender v. Guild*, 4 Id. 253.

54. In entering a judgment, the correct rule is to add the interest due on the note up to the time of the judgment to the principal, and enter the judgment for the gross amount, and such judgment is then to bear the same interest as the note until paid. *Guy v. Franklin*, 5 Cal. 417; *Emeric v. Tams*, 6 Id. 156.

55. When a judgment is entered upon the *cognovit*, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where upon complaint and answer denying the allegations thereof, the acknowledgment is used as evidence, interest may be given in the judgment by way of damages. *Hirschfeld v. Franklin*, 6 Cal. 607.

56. The provision of the statute on interest, which authorizes judgments to bear the same interest as the contracts on which they are recorded, was intended to be confined to contracts fixing the rate of interest. *Raun v. Reynolds*, 10 Cal. 19.

57. In a judgment in a suit on a note bearing an agreed amount of interest, the interest is to be computed and made a part of the judgment, and the judgment should bear the agreed interest. *Mount v. Chapman*, 9 Cal. 294.

58. **When equity will, and will not, interfere.**—An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 445.

59. An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession. *Jackson v. Norton*, 6 Cal. 189.

60. If a party enters judgment for too much, or before the whole amount is due, it is not conclusive, but only *prima facie*, evidence of fraud to avoid the judgment. *Patrick v. Montader*, 13 Cal. 442, overruling *Taaffe v. Josephson*, 7 Cal. 356.

61. Where a party moves for a new trial, and fails, he cannot on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 228.

62. To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Riddle v. Baker*, 13 Cal. 304.

63. Courts of Equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ewer*, 16 Cal. 470.

64. The nature and extent of the relief in such cases are matter resting very much in the sound discretion of the Court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such Courts of Equity seldom relieve. *Id.*

### § 145. Judgment may be for or against one of the parties.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

N. Y. Code, § 274.

1. Where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants and in favor of one of the defendants against the plaintiff. Thus, where A sued B and C as partners, and the misjoinder was not set up in the answer, and the plaintiff's demand was proved against B, but not against C, and verdict and judgment were given in favor of the plaintiff against B, and in favor of C against the plaintiff, on appeal the judgment was affirmed. *Rowe v. Chandler*, 1 Cal. 167.

2. Where it is clear that two or more defendants are not liable jointly, a joint judgment against both cannot be sustained, although each may be severally liable; so held in an action by a lessor against two subtenants of his lessee, when it appeared that the subtenants did not occupy any portion of the premises jointly. *Pierce v. Minturn*, 1 Cal. 470.

3. Where some of the defendants, partners, are not served with process, the plaintiff may proceed against those served. *Ingraham v. Gildermester*, 2 Cal. 88.

4. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. *Matthey v. Galley*, 4 Cal. 64.

5. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Hirshfield v. Franklin*, 6 Cal. 607.

6. In an action brought jointly against two defendants, on a joint and several obligation, the entry of final judgment on default against one of the defendants is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 182.

7. In all cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demand as joint for the purposes of the action, he must be governed by the same rules which would have applied if his contract originally had been joint, and not joint and several; and it is clearly error to enter several judgments against the defendants. *Id.*

8. Where two defendants are jointly sued, and service had on both, the Clerk of the Court has no authority to enter judgment by default against one; and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 449.

9. Where the plaintiff established his right to recover against both defendants, judgment should be entered against them. *Id.*

10. Where the obligors in a Sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. *People v. Edwards*, 9 Cal. 286.

11. A judgment against one or more joint guarantors of a note bars the action against the others. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. *Brady v. Reynolds*, 13 Cal. 31.

12. Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 558.

13. In suit against several defendants known as "Table Mountain Water Company," for possession of a ditch, the verdict was: "We find for the plaintiff and against L."—one of the defendants. Judgment was entered that defendant surrender possession of the ditch to plaintiff, and that plaintiff recover of L., "one of said defendants, the sum of —, his costs," etc.: *Held*, that there is no error in the judgment; that it must be construed by the verdict, which is confined to plaintiff and L. *Treat v. Laforge*, 15 Cal. 41.

14. In suit against husband and wife for services rendered by plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced only against the separate property of the wife and the common property of both. *Van Maren v. Johnson*, 15 Cal. 308.

15. Where, in an action against defendants jointly and not severally liable, a portion only of them are served with process, the Clerk cannot, on the application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void. *Kelley v. Austin*, 17 Cal. 564.

16. The proper course in such case is, to enter judgment against all the defendants, but so as to be enforced against the joint property of all and the separate property of those served. *Id.*

17. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note to bind all, and one of the parties is



non-suited and judgment taken against the other two: *Held*, that there is no error in such judgment. *Stoddard v. Van Dyke*, 12 Cal. 438.

18. In suit, on an account against "Randall & Inas," partners, the former only being served with process, a joint judgment was rendered against both: *Held*, that the judgment is void as against the party not served. *Inas v. Winspear*, 18 Cal. 397.

\* 19. Plaintiff sells goods to C. on his individual account. Subsequently, C. directs plaintiff to charge the goods to the joint account of C. & J., which is done. Plaintiff sues C. & J. jointly. Proven that C. had no authority to bind J.: *Held*, that, although J. is not liable, judgment may be rendered against C.; that our Practice Act (Sec. 145) has modified the common law rule; that, in suit against several joint debtors, plaintiff must recover against all or none—so far, at least, as to permit judgment against a portion of the defendants wherever the contract purports on its face to be the contract of all the parties sued, and it turns out in proof that a portion only are liable. *Lewis v. Clarkin*, 18 Cal. 399.

20. In suit against two on a joint assessment for taxes, judgment may be rendered against one only of the defendants, if the other be not liable. *People v. Frisbie*, 18 Cal. 402.

21. The common law rule, that where defendants are sued on a joint contract, recovery must be had against all or none, modified by our Practice Act. *Id.*

22. *Query*: whether the rule is entirely abrogated. New York cases cited. *Id.*

23. In an action against two for injury to property without force, the evidence showed that the injury resulted from the joint act of the two, but the jury found that each was liable for a part only of the injury, and they severed the damages accordingly, and judgment was entered for a different sum against each: *Held*, that neither judgment could be sustained, and it was not a case for permitting the plaintiff to elect, since it was impossible to say upon what ground the jury had based the liability of either. *Turner v. McCarthy*, 4 E. D. Smith's C. P. R. 247.

24. Two defendants were sued together as having jointly committed a tort, and on the trial it was proved, by competent and sufficient evidence, that they jointly did the wrong, and that the plaintiff had been damaged to the amount of six hundred dollars. The referee before whom the cause was tried, severed the damages, assessing them at one hundred and fifty dollars against one defendant, and six hundred dollars against the other. On his report, the plaintiff entered judgment against both for six hundred dollars, without any formal remittitur as to the lesser amount: *Held*, on appeal from the judgment, that the severing of the damages was rightly disregarded in entering the judgment, and that the judgment so entered was correct, and should be affirmed, with leave to the plaintiff to modify its form, (if so advised) so as to state that he elected to remit the lesser sum, and take judgment against both for the larger sum. *O'Shea v. Kirker*, 8 Abb. Fr. R. 69.

### § 146. Judgment may be against one party and action proceed as to others.

In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

N. Y. Code, § 274.

### § 147. The relief to be awarded to the plaintiff.

The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

N. Y. Code, § 275.

1. Where judgment is taken by default, no relief can be given beyond that demanded in the complaint. *Raum v. Reynolds*, 11 Cal. 19.

§ 148. *Action may be dismissed or nonsuit entered.*

An action may be dismissed, or a judgment of nonsuit entered in the following cases:

1st. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the Clerk to the defendant, who may have his action thereon.

2d. By either party, upon the written consent of the other.

3d. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4th. By the Court, when upon the trial, and before the final submission of the case, the plaintiff abandons it.

5th. By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the Clerk's register. Judgment may thereupon be entered accordingly.

1. **First subdivision.**—Plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted and the jury has retired; but such right does exist at any time before such final submission and retirement. *Brown v. Harter*, 18 Cal. 76.

2. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

3. Nor, under the one hundred and forty-eighth section of the Practice Act, is he bound to tender costs before the nonsuit. The provision as to costs is simply that, by the nonsuit, plaintiff becomes subject to costs. *Id.*

4. **Third subdivision.**—Where the plaintiff fails to appear and prosecute his suit, and the defendant moves for a nonsuit, the Court has no alternative but to grant it. *Peralta v. Mariae*, 3 Cal. 185.

5. **Fifth subdivision.**—Where four persons were sued as codefendants on a joint contract, and the plaintiffs adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground, but refused by the Court, and judgment was rendered against all the defendants jointly: *Held*, that the judgment was erroneous; but held further, that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just. *Acquital v. Crowell*, 1 Cal. 121.

6. If there be some evidence which tends or conduces to prove all the material allegations of the complaint, the sufficiency thereof is a question for the jury; but where there is no evidence on some material point necessary to be proved in order to make out a cause of action, it becomes the duty of the Court, on motion of the defendant, to order a nonsuit. *Ringgold v. Haven*, 1 Cal. 108.

7. An action was brought against the defendants to recover damages for injuries to goods in being carried from New York to San Francisco, founded not upon contract, but upon the common law duty of carriers: *Held*, that it was necessary

for the plaintiff to establish, not only the delivery of the goods to the defendants, but that they were engaged in the business of transporting goods as common carriers; and there being no evidence whatever that the defendants were common carriers: *Held*, also, that a motion for a nonsuit should have been granted by the Court below. *Id.*

8. The doctrine of *Ringgold v. Haven & Livingston*, (*ante*, 108) that it is the duty of the Court in a proper case to nonsuit the plaintiff, affirmed. *Dalrymple v. Hanson*, 1 Cal. 125.

9. Where there is no evidence to make out a cause of action, the Court should nonsuit the plaintiff. *Id.*

10. If the evidence of the plaintiff will not authorize a jury to find a verdict for him, or if the Court would set it aside, if so found, as contrary to evidence, it is the duty of the Court to nonsuit the plaintiff. *Mateer v. Brown*, 1 Cal. 221.

11. Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not. *Valentine v. Stewart*, 15 Cal. 387.

12. **Referee may grant.**—Under our statute, the referee takes the place of the Judge, in the trial of all cases referred to him, and may grant a nonsuit. *Plant v. Fleming*, 20 Cal.

13. **What operates as a discontinuance.**—The plaintiff commenced an action of forcible entry and detainer against the defendant, in a Justice's Court. The Justice, instead of trying the case, certified it to the District Court: *Held*, that the transfer was illegal, and could not defeat the plaintiff's rights by operating as a discontinuance. *Larue v. Gaskins*, 5 Cal. 507.

14. The submission of a cause in Court to arbitration operates as a discontinuance of the suit. *Gunter v. Sanchez*, 1 Cal. 45.

15. **Generally.**—Where the complaint in an action on a bill of exchange describes it as payable to the order of A, whereas the bill offered in evidence is drawn payable to B, it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit. *Farmer v. Cram*, 7 Cal. 135.

16. Where a motion is made for a nonsuit, without stating the grounds upon which it is made, it is not error to overrule the motion. *Kiler v. Kimball*, 10 Cal. 267.

17. Nonsuit not proper where there is any evidence tending to prove the indebtedness. *Cravens v. Dewey*, 13 Cal. 40.

18. Where a defendant moved for a nonsuit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony, on which the motion for nonsuit was founded: *Held*, that the defendant had thereby waived his motion, and could not insist upon it in this Court. *Ringgold v. Haven*, 1 Cal. 108.

19. *Per BENNETT, J.*—The practice of nonsuit and of demurrer to evidence considered. *Id.*

20. The decision in *Ringgold v. Haven*, (*ante*, 108) that the power of compulsory nonsuit exists, approved. *Mateer v. Brown*, 1 Cal. 221.

21. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 268.

22. In ejectment, upon disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noë v. Card*, 14 Cal. 576.

23. Where plaintiffs, having excepted to the ruling of the Court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. Objections to the introduction of evidence confined, in the appellate Court, to the grounds taken below. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

24. A failure on the part of a plaintiff to make out his case, and error in the Court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense. *Winans v. Hardenburgh*, 8 Cal. 291.

25. Costs, by way of indemnity, ought not to be taxed in case of a nonsuit. *Rice v. Leonard*, 5 Cal. 61.

26. Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in

this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett v. Ritchey*, 3 Cal. 327.

27. When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury. *De Ro v. Cordes*, 4 Cal. 117.

28. Where a motion for a nonsuit was improperly denied, but the defendant then introduced testimony enabling the plaintiff to supply the defect in his case: *Held*, that defendant thereby waived the objection. *Smith v. Compton*, 6 Cal. 24; *Perkins v. Thornburg*, 10 Id. 189.

29. On a motion for a nonsuit, the Judge, for the time being, unites, like a referee, the character of Judge and jury. As jury, he ascertains the facts; as Judge, he applies the law to them; and when he announces his decision, it is to compound result of an ascertainment of the facts and the application of the law. The details do not necessarily appear in the decision of the motion, any more than they appear in the verdict of a jury, or the report of a referee. And if a party wants these details, he must get them by a special application, at the time, to the Court for that purpose. In this way only can the several questions which properly arise be distinctly presented and intelligently passed upon, and the rights of all parties be carefully guarded. *Barnes v. Perrine*, 2 Kern. 22; *People v. Cook*, 4 Seld. 78; *Notton v. Moses*, 3 Barb. 31; *Beekman v. Bond*, 19 Wend. 444; *Jackson v. Packard*, 6 Id. 415; *Jackson v. Timmerman*, 12 Id. 299; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 410; *Bidwell v. Lament*, 17 How. Fr. R. 357.

30. The dismissal of the complaint, under the Code of Procedure, in an action in the nature of what were formerly termed common law actions, is identical with a nonsuit under the former practice. *Coit v. Bland*, 12 Abb. Pr. R. 462.

31. On a motion for nonsuit, the defendant must bring the special grounds which justify a nonsuit before the notice of the Court. Such a motion, based upon general grounds, no objection being taken to the form of pleadings, or to the admissibility of evidence under them, does not raise the question that the action should have been *case* for the defendant's negligence, instead of trespass for a direct injury. Such objections will not be listened to, unless distinctly made. *Castle v. Duryea*, 32 Barb. 480.

### § 149. *Judgment on the merits, when.*

In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

## CHAPTER II.—*Judgment upon failure to answer.*

SEC. 150. *In what cases judgment may be had upon the failure of the defendant to answer.*

Judgment may be had, if the defendant fail to answer the complaint, as follows:

1st. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons,

including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section thirty-two.

2d. In other actions, if no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first, or any subsequent term of the Court, for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the Court may order the damages to be assessed by a jury; or, if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided.

3d. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the Court shall thereupon require proof to be made of the demand mentioned in the complaint: and if the defendant be not a resident of the State, shall require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

1. **First subdivision.**—A default may as well be taken against a municipal corporation as against a private person. The rules of pleading are general; they were designed to embrace all persons, natural or artificial, capable of suing or being sued. *Hunt v. City of San Francisco*, 11 Cal. 250.

2. A judgment by default may as well be taken against an administrator as any other party. *Chase v. Swain, Administrator*, 9 Cal. 130.

3. Where the complaint is verified, and the defendant fails to answer, plaintiff is entitled to judgment on the complaint without proof of the facts alleged therein. *Tuolumne Redemption Co. v. Patterson*, 18 Cal. 415.

4. A final judgment by default can properly be rendered upon an unliquidated demand, where the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman v. Williams*, 4 Cal. 254.

5. The several counts are distinct causes of action; and the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. *Hunt v. City of San Francisco*, 11 Cal. 250.

6. A default on a complaint containing special counts defectively stated will support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint. *Id.*

7. In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified may be stricken out on motion, and application for judgment, as upon default, may be made at the same time. *Drum v. Whiting*, 9 Cal. 422.

8. Where the action is against defendants severally liable, a portion only being served with process, the Clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint. *Kelly v. Van Austin*, 17 Cal. 564.

9. Where, in an action against defendants jointly and not severally liable, a portion only of them are served with process, the Clerk cannot, on the application of plaintiff, enter judgment, upon default, against the parties served only. A judgment so entered is void. *Id.*

10. In entering judgments upon default, the Clerk acts in a mere ministerial capacity; exercises no judicial functions; and must conform strictly to the provisions of the statute, or his proceedings will be without any binding force. *Id.*

11. In an action upon a verbal agreement to indemnify a Sheriff for seizing property on execution, the Clerk may enter judgment upon default of defendant, in not answering after his demurrer has been overruled. *Stark v. Raney*, 18 Cal. 622.

12. **Second subdivision.**—Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. In this case, the Court denied a trial by jury, and took proof as to title and possession. *Smith v. Billett*, 15 Cal. 23.

13. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the Clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the Court a decree for the equitable relief sought in the complaint, to wit: for a lien upon and a sale of the real estate: *Held*, that this decree was *coram non judge*, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 381.

14. Doubtful whether the Clerk could enter judgment, in an action of this nature, without application to the Court. This point reserved. *Id.*

15. **Where default will and will not be set aside.**—Judgment by default set aside on the ground of surprise. *Bidleman v. Keven*, 2 Cal. 248.

16. It is no ground for setting aside a judgment by default, that the defendant was ignorant of the law requiring him to answer in ten days. *Chase v. Swain, Administrator*, 9 Cal. 130.

17. After the adjournment of the term, a Court loses all control over its judgments, unless its jurisdiction is saved by some motion or proceeding at the time. *Shaw v. McGregor*, 8 Cal. 521.

18. The only exception is when personal service of summons has not been made, in which case the party, against whom it is entered, may move to set it aside. *Id.*

19. An order of Court setting aside a default and judgment entered during vacation is regular and correct, when there has been no service of summons upon the defendants. *Pico v. Carrillo*, 7 Cal. 32.

20. Where two defendants are jointly sued and service had on both, the Clerk of the Court has no authority to enter judgment by default against one, and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 443.

21. A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel v. Dukes*, 12 Cal. 482.

22. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not a ground for reversal. *Anderson v. Parker*, 6 Cal. 201.

23. Case where the Court below set aside a judgment by default in ejectment, and allowed the landlords of the defendants to come in and defend. *Barrett v. Graham*, 19 Cal. 632.

24. **What a default cures or admits.**—A defective allegation of a fact

may be cured by default or verdict, but not so the entire absence of any allegation whatsoever. *Hentsch v. Porter*, 10 Cal. 555.

25. A default only admits the facts alleged in the complaint. *Id.*; *Harlan v. Smith*, 6 Cal. 173; *McGregor v. Shaw*, 11 Id. 47.

26. Where a man is sued by a fictitious name, and the return of the Sheriff on the summons shows service on the defendant by his proper name as "John Doe, alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 117.

27. Where the complaint avers title as administrator, a default admits it. *Id.*

28. The judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. *Chase v. Swain, Administrator*, 9 Cal. 130.

29. A default on a complaint containing special counts, defectively stated, and also the common counts in *assumpsit*, properly stated, will support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint. *Hunt v. City of San Francisco*, 11 Cal. 250.

30. Where the summons has been duly served, a judgment by default amounts to a confession on the part of the defendants of all the material facts in the complaint. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

31. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and judgment by default is regularly entered, the judgment is valid. *Smith v. Billett*, 15 Cal. 23.

32. The want of an allegation of actual ouster in a complaint in ejectment is a defect which cannot be cured by a default taken through the mistake or inadvertence of defendant's counsel. *Watson v. Zimmerman*, 6 Cal. 47.

33. **When Clerk may not enter a judgment.**—Upon facts found, whether by report of referee or special verdict of the jury, the direct action of the Court must be invoked before the judgment can be entered. *Peabody v. Phelps*, 9 Cal. 224.

34. **When may, or not, be attacked collaterally.**—A judgment by default, when summons has been served on defendant, cannot be attacked collaterally for a mere irregularity of service, or for a defective return. The defendant should assert his rights by appeal from the judgment. *Dorente v. Sullivan*, 7 Cal. 279.

35. A personal judgment of a Court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the Court had acquired no jurisdiction over the person of the defendant. *Whitwell v. Barbier*, 7 Cal. 54.

36. There is, however, a very decided distinction between want of jurisdiction and irregularity in procuring jurisdiction. *Id.*

37. In the one case, the judgment can be attacked in any form, directly or collaterally; in the other, only by a direct proceeding against the judgment in the Court which rendered it, or in an appellate Court upon appeal from the judgment. *Id.*

38. The true test is, whether the omission be of the form or of the substance of the act required to be performed. *Id.*

39. **Equity will not interfere, when.**—If a judgment by default be void because entered by the Clerk without authority, that fact constitutes no ground for equity to interfere. *Chipman v. Bowman*, 14 Cal. 158.

40. A defendant, having no defense to an action, cannot go into equity and enjoin a judgment by default, on the ground that the Sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Id. 286; *Logan v. Hillegas*, 16 Id. 202.

CHAPTER III.—*Of issues, and the manner of their disposition.*

SEC. 151. *Issue defined, and their different kinds.*

152. *Issue of law, how raised.*

153. *Issue of fact, how raised.*

154. *Issue of law, how tried.*

155. *Issue of fact, how tried ; when issues both of law and fact, the former to be first disposed of.*

156. *Clerk shall enter causes on the calendar, and to remain until disposed of.*

157. *Parties may bring issue to trial.*

158. *Motions to postpone on grounds of absence of evidence, requisites of.*

§ 151. *Issue defined, and their different kinds.*

An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds :

1st. Of law ; and,

2d. Of fact.

N. Y. Code, § 248.

§ 152. *Issues of law, how raised.*

[1854.] An issue of law arises upon a demurrer to the complaint, or answer, (or) to some part thereof.

N. Y. Code, § 249.

§ 153. *Issues of fact, how raised.*

[1854.] An issue of fact arises :

1st. Upon a material allegation in the complaint, controverted by the answer ; and,

2d. Upon new matters in the answer, except an issue of law is joined therein.

N. Y. Code, § 250.

1. **Allegations must be controverted to raise issue.**—After judgment by default in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billet*, 15 Cal. 26.

2. Where the plaintiff sued for a note of six hundred dollars, and the defendant in his answer did not deny anything stated in the complaint, but set up as a counter claim that the plaintiff owed him forty dollars for goods sold, to which the plaintiff did not reply, it was held that no issue arose. *Pardee v. Schenck*, 11 How. Pr. R. 500.



§ 154. *Issues of law, how tried.*

An issue of law shall be tried by the Court, unless it be referred, upon consent, as provided in chapter six of this title.

N. Y. Code, § 253.

1. Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. *Chenery v. Palmer*, 6 Cal. 122.

§ 155. *Issue of fact, how tried; when issues both of law and fact, the former to be first disposed of.*

An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of.

N. Y. Code, § 253. As to waiver of trial by jury, see § 179.

1. **Jury trial in equity cases.**—The trial by jury does not necessarily attach to equity cases. *Smith v. Rowe*, 4 Cal. 7.

2. In chancery proceedings, parties are not entitled to a trial by jury, because it would be utterly fruitless. *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, Id. 249.

3. The language of the Constitution as to the right of trial by jury, was used with reference to the right as it exists at common law. This right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the Court. *Koppikus v. State Capitol Commissioners*, 11 Cal. 248.

4. A Court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings, and submitted to the jury. *Curtis v. Sutter*, 15 Cal. 263; *Weber v. Marshall*, 19 Id. 447.

5. Special issues, framed by the Court according to chancery practice, may be tried by a jury in equity cases; but if the failure to present the issues is the result of plaintiff's own motion, he cannot be allowed to take advantage of it. *Brewster v. Bours*, 8 Cal. 505.

6. In chancery cases, the Court below may disregard the verdict of a jury. *Goods v. Smith*, 13 Cal. 84.

7. In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: *Held*, that the relator is not entitled to a jury to try the issue. *People v. Judge of the Tenth Judicial District*, 9 Cal. 21.

8. **What are proper questions for a jury.**—Where the boundaries of a lot of land granted by an Alcalde are uncertain, the jury should determine the true location of the lot in question. *Reynolds v. West*, 1 Cal. 328.

9. The question of the possession and identity of the land should be left to the jury. *Hicks v. Davis*, 4 Cal. 69.

10. What is actual and what is constructive possession in many cases, must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 65.

11. The fact of the dedication of the premises by possession as a homestead, was properly submitted to the jury. *Cook v. McChristian*, 4 Cal. 26.

12. Dedication of a street is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question as against the owner of the soil being whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a public highway. *Harding v. Jasper*, 14 Cal. 648.

13. The question of abandonment of a mining claim should be left to the jury, upon the facts adduced in evidence. *Waring v. Crow*, 11 Cal. 371.

14. The reasonableness of the use of water is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Esmond v. Chew*, 15 Cal. 143.

15. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

16. In an action of trespass, the question of damages is a question particularly for the jury. *Drake v. Palmer*, 4 Cal. 11.

17. The fact whether a structure was a public nuisance is a question, not for the Court, but for the jury, to decide. *Gunter v. Geary*, 1 Cal. 467.

18. What facts and circumstances constitute evidence of carelessness, is a question of law for the Court to determine. But what particular weight the jury should give to these facts and circumstances, is a matter for the jury. *Gerke v. California Steam Navigation Co.*, 9 Cal. 258.

19. The question of malice in an action for malicious prosecution is one solely for a jury, and the charges must be shown to have been willfully false. *Potter v. Seale*, 8 Cal. 200.

20. In an action for malicious prosecution of a suit on a bill of exchange which was paid, whether the plaintiffs in that suit knew that the bill was in fact paid, or not, when they sued, is a question for the jury. *Weaver v. Page*, 6 Cal. 684.

21. Whether such a custom existed, or not, when a custom is about being proven, is a question for the jury to decide. *Panaud v. Jones*, 1 Cal. 500.

22. The question of notice of dissolution of partnership is a fact for the jury, under the charge of the Court. *Rabe v. Wells*, 3 Cal. 151; *Treadwell v. Wells*, 4 Id. 463.

23. After judgment by default in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billett*, 15 Cal. 26.

24. An order of reference to ascertain the amount of damages for the wrongful serving out of an injunction, is in violation of the right to a trial by jury. *Russell v. Elliott*, 2 Cal. 246.

25. Where an action is brought for the balance of an account, and the answer avers payment by a promissory note, and the plaintiff replies that he was induced to receive the note by fraud, the Court held that it was one of the cases where the party was entitled to a trial by jury, and it could only be referred by consent of the parties. *Seaman v. Marian*, 1 Cal. 336.

26. When a party cannot object that his case was not tried by a jury.—A party cannot go on and try his case before a Judge, without objection, and after he has lost it, complain that the case was not tried by a jury. *Smith v. Brannan*, 13 Cal. 115.

27. As to facts recurring in the presence of the Court.—A Court does not require the verdict of a jury to inform it of facts recurring in the presence of the Court itself. *People v. Judge of the Tenth Judicial District*, 9 Cal. 21.

28. Issue of fact cannot be tried in the Supreme Court.—The Legislature has not provided the Supreme Court with a jury in any case, nor authorized it to cause an issue of facts to be made up in this Court and referred to another Court for trial. All issues of fact are to be tried in an inferior Court of this State. *Ex parte the Attorney General*, 1 Cal. 87.

§ 156. Clerk shall enter causes on the calendar, to remain until disposed of.

The Clerk shall enter causes upon the calendar of the Court, according to the date of the issue. Causes once placed on the calen-

dar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from Court to Court, until finally disposed of.

N. Y. Code, § 256.

§ 157. *Parties may bring issue to trial.*

Either party may bring the issue to trial, or to a hearing, and in the absence of the adverse party, unless the Court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.

1. **Issue must be raised between all the parties.**—An action cannot regularly be brought to trial until it is in such a situation that a *final judgment* can be rendered between *all the parties*. It cannot be had in sections without leave of Court. *Ward v. Dewey*, 12 How. Pr. R. 193.

§ 158. *Motions to postpone a trial for absence of testimony, requisites of.*

A motion to postpone a trial, on the ground of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The Court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

1. **Continuance discretionary with the Court.**—The granting or refusing a continuance rests in the sound discretion of the Court. *Mugrove v. Perkins*, 9 Cal. 211.

2. The granting or refusing a continuance rests in the sound discretion of the Court below; and even when the facts show that the action of the Court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed, unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witness, if such affidavits can be obtained; or if not, then it should be shown to the Court that they cannot be obtained. Unless this be done, this Court will not interfere, in civil cases, with the action of the lower Court. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161.

3. **Affidavits must show materiality of evidence.**—Where a party applied for a continuance to enable him to take the deposition of an absent witness, and the proof which was designed to be obtained would constitute no defense to the plaintiff's claim, the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 470.

4. A party is bound to know the materiality of testimony, except in the case of surprise at trial. *Berry v. Metzler*, 7 Cal. 418.

5. In respect to the absence of defendant's witnesses, it was not shown that their testimony was material, or that the defendant had used due diligence to obtain their attendance. Both these things must be shown, to make the absence of witnesses a ground of adjourning a cause. *Fake v. Edgerton*, 6 Duer, 653.

6. **That the evidence is not cumulative.**—Affidavits for a continuance, on the ground of absence of witnesses, should state that the facts expected to be proved by the absent witnesses cannot otherwise be proved. *People v. Quincy*, 8 Cal. 89.

7. An affidavit for continuance, on the ground that a witness is absent from the State, must aver that the party cannot, to his knowledge, prove the same facts by any other witness. *People v. Payne*, 14 Cal. 419.

8. **That the application is not made for delay.**—An affidavit for a continuance, on the ground of absence of a witness, should state that the testimony wanted is not simply cumulative, and cannot be proven by others, but that the application is not made for delay; the character of the diligence used in trying to obtain the attendance of the witness, whether by exhausting the process of the law or otherwise, should also be stated. *People v. Thompson*, 4 Cal. 240; *People v. Quincy*, 8 Id. 89; *Pierce v. Payne*, 14 Id. 420.

9. **That due diligence has been used.**—Affidavits for continuance should show due diligence in endeavoring to procure the attendance of witnesses and in preparing the trial. *People v. Baker*, 1 Cal. 404.

10. Absence of evidence is no ground for continuance, unless reasonable diligence has been used to procure it. The party must have resorted to proper legal means for that purpose, or must satisfy the Court that a resort to such means would have been useless. *Kuhland v. Sedgwick*, 17 Cal. 123.

11. When evidence is in a party's own possession, its absence is not excused, on motion for continuance, by showing that through inadvertence he is unable to produce it. *Id.*

12. The answer of defendant was filed May 10th, 1852, and the application for a continuance, to take testimony in New York, was filed June 14th, 1852, during which interval no attempt was made to sue out a commission for the purpose: *Held*, that this is not a sufficient diligence to entitle the party to his application. *Pierson v. Holbrook*, 2 Cal. 598.

13. **Admissions made to prevent a continuance.**—The plaintiff, to avoid the continuance, admitted that a witness would testify to certain facts set up in the affidavit, and the trial proceeded. This affidavit, therefore, became evidence, but not conclusive proof of its contents. *Blankman v. Vallejo*, 15 Cal. 645.

14. Where it is admitted, for the purpose of preventing a continuance, that the several witnesses named would, if present, respectively testify as stated in the affidavit, and that their testimony should be considered as actually given on the trial, or as offered and overruled by the Court as improper, the testimony thus assumed was offered, and for all the purposes of the case must be deemed as actually before the Court. *Boggs v. Merced Mining Co.*, 14 Cal. 358.

15. **Surprise as a ground for continuance.**—If defendants were surprised by an amendment, and found it necessary to assume a different line of defense in consequence of it, they would have been entitled to a continuance to prepare for their defense. *Polk v. Coffin*, 9 Cal. 58.

16. A refusal to grant a continuance for the absence of witnesses or counsel, under circumstances showing that the party or his counsel was surprised as to the time or place of holding Court, is error. *Ross v. Austill*, 2 Cal. 183.

17. **Discovery of new evidence.**—It is not good ground for a new trial that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Berry v. Metzler*, 7 Cal. 418.

18. **General decisions.**—A mistaken advice of counsel to his client, not to prepare for trial, is no ground for a continuance. *Musgrove v. Perkins*, 9 Cal. 211.

19. An agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the Court. *Peralta v. Marica*, 3 Cal. 187.

20. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this, he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

21. Courts are extremely liberal and indulgent in granting adjournments, and they are seldom or never appealed to in vain. *Id.*

22. In criminal cases, on a motion for continuance by defendant, on the ground of the absence of a material witness, based on a sufficient affidavit, the agreement of the District Attorney that the witness, if present, would have deposed as averred in defendant's affidavit, is not sufficient to warrant overruling the motion. *People v. Diaz*, 6 Cal. 249.

23. Where a case in the Twelfth District was set for trial on a particular day with the knowledge and consent of defendant's attorney, and he then, two or three days before the day of trial, goes to Alameda county to try another cause there, a continuance was denied. *Haight v. Green*, 19 Cal. 113.

24. A motion to adjourn, for the want of material evidence, may properly be denied, when founded upon an affidavit which is not entitled, and which also fails to show in the body of the affidavit, either by naming the parties or otherwise, in what action the same is made. *Inoy v. Nathan*, 4 E. D. Smith's C. P. R. 68.

25. Though the engagement of counsel is generally regarded as a ground of indulgence, yet where, as in this case, one adjournment had already been had on that ground, and the adjournment asked for would have put the cause over the summer vacation for three months, it ought not to be granted. *Fake v. Edgerton*, 6 Duer, 653.

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## CHAPTER IV.—*Trial by Jury.*

### ARTICLE I.

#### FORMATION OF THE JURY.

SEC. 159. *Jury, how drawn, and how many to consist of.*

160. *Jury to be sworn.*

161. *Challenges; each party entitled to four peremptory challenges.*

162. *Grounds of challenges.*

163. *To be tried by the Court. Witnesses may be examined.*

§ 159. *Jury, how drawn, and how many to consist of.*

When the action is called for trial by jury, the Clerk shall prepare separate ballots containing the names of the jurors summoned, who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror, or jurors, be excused or discharged, the Sheriff shall summon, under the direction of the Court, from the citizens of the county, and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve

persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the Clerk in the minutes of the trial.

1. **Qualifications of jurors.**—A person shall not be competent to act as juror unless he be: first, a citizen of the United States; second, an elector of the county in which he is returned; third, over twenty-one and under sixty years of age; and fourth, in the possession of his natural faculties; fifth, nor shall any person be competent to act as a juror who has been convicted of a felony, or misdemeanor, involving moral turpitude. Stat. 1853, 107.

2. A juror must be an elector of the county in which he is returned, and have resided in the county thirty days. *Sampson v. Schaffer*, 3 Cal. 107.

3. Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident, within the meaning of the law, so as to constitute an elector. *People v. Peralta*, 4 Cal. 175.

4. A citizen of the State, who has resided in the county fourteen days, and then been absent some months from the State, with the intention of returning to reside in the county, and has returned and resided some fourteen days in the county, is a competent juror, his residence dating from the first residence, and not from his return. *People v. Stonecipher*, 6 Cal. 410.

5. **In actions against a Sheriff.**—When the Sheriff is a party to the action, the Court may order the cause tried by a special jury, to be summoned by the Coroner. *Pacheco v. Hunsacker*, 14 Cal. 120.

6. In trespass against a Sheriff, the Court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The Sheriff, being interested, ought not to summon a jury. And there being no Coroner, an Elisor may be appointed to summon a jury. *Id.*

7. **Objections to a juror, how waived.**—A party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification. *People v. Stonecipher*, 6 Cal. 411.

8. Affidavits to the incompetency of a juror must be embodied in a bill of exceptions, or they will not be examined by the appellate Court. *Id.*

9. Where parties proceed to trial before a jury, without objection to the manner in which such jury was impaneled, it is too late after verdict to make such objection. *Dayharsh v. Enos*, 1 Seld. 531; *Mayor of New York v. Mason*, 1 Abb. Pr. R. 352.

10. **Objections to panel.**—An objection is not well taken to the panel of a trial jury, on the ground that such jury was summoned by order of the Court after the commencement of the term. *People v. Rodriguez*, 10 Cal. 59.

11. Unless an irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Thrall v. Smiley*, 9 Cal. 538.

12. The objection to the qualification of a juror, that his name was not on the venire returned by the Sheriff, comes too late after the verdict. The objection, if it had any validity, should have been urged at the trial. *Id.*

13. No regular panel having been drawn and summoned, the Court ordered thirty-six jurors to be summoned, which was done; and twenty-seven of them appearing, the Court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel: *Held*, not to be a ground for challenge to the whole panel. *People v. Stuart*, 4 Cal. 225.

## § 160. Jury to be sworn.

As soon as the jury is completed, an oath or affirmation shall be administered to the jurors, in substance: that they, each of them, will well and truly try the matter at issue between ———, the

plaintiff, and ———, the defendant, and a true verdict render according to the evidence.

§ 161. *Challenges ; each party entitled to four peremptory challenges.*

Either party may challenge the jurors ; but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges shall be to individual jurors, and shall either be peremptory or for cause. Each party shall be entitled to four peremptory challenges.

1. Where several defendants are tried together, they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory as to challenges for cause. *People v. McCalla*, 8 Cal. 303.

§ 162. *Grounds of challenge.*

[1860.] Challenges for cause may be taken on one or more of the following grounds :

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity within the third degree to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party ; or being a member of the family of either party ; or a partner in business with either party ; or being security on any bond or obligation for either party.

4th. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

5th. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

J. P.

1. **General decisions.**—A general challenge of a juror for cause, without specification of the particular ground, is insufficient. The statute enumerates several different grounds for which such challenge may be taken, and a designation of the one upon which any particular challenge rests is essential to its consideration by the Court. It is not sufficient to say : " I challenge the juror for cause," and then stop. *Paige v. O'Neal*, 12 Cal. 483.

2. That a jury has just tried a case involving the liability of defendant for a similar cause of action, depending on the same general considerations, does not render the jury incompetent to sit in the subsequent case. *Algier v. Steamer Maria*, 14 Cal. 167.

3. **Third subdivision.**—It has always been considered a principal cause of challenge to a juror, that he is a tenant of either of the parties to a suit. *Hathaway v. Helmer*, 25 Barb. 29.

4. **Sixth subdivision.**—That a juror has read or heard a statement of the facts of a case, does not, of itself, disqualify him, under the statute; for he may not have formed or expressed an "unqualified opinion." A mere impression or suspicion derived from such reading or hearing, does not disqualify. The juror must have reached a conclusion, like that upon which he would be willing to act in ordinary matters. *People v. Reynolds*, 16 Cal. 138.

5. In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror. *White v. Moses*, 11 Cal. 68.

6. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was raised until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of plaintiff. *Lawrence v. Collier*, 1 Cal. 37.

7. A juror who, upon a statement of facts submitted by a plaintiff, has expressed an opinion as to the liability of the defendant, is not indifferent, and upon challenge will be excluded from the panel. *Rogers v. Rogers*, 14 Wend. 131.

8. **Seventh subdivision.**—The law contemplates that every juror who sits in a cause shall have a mind free from all bias or prejudice of any kind; and if a juror is prejudiced in any manner, he is not a proper person to sit in the jury box. *People v. Reyes*, 5 Cal. 347.

9. Prejudice is a state of mind which, in the eye of the law, has no degrees. *Id.*

10. A juror being challenged for bias, was examined before triers, and asked the following questions: 1st. Are you not a member of a secret and mysterious order, known as and called Know Nothings, which has imposed on you an oath or obligation, beside which an oath administered to you in a Court of Justice, if in conflict with that oath or obligation, would be by you disregarded? 2d. Are you a member of any secret association, political or otherwise, by your oaths or obligations to which any prejudice exists in your mind against Catholic foreigners? 3d. Do you belong to any secret political society, known as, and called by the people at large in the United States, Know Nothings? and if so, are you bound by an oath, or other obligation, not to give a prisoner of foreign birth, in a Court of Justice, a fair and impartial trial? *Held*, that the Court erred in ruling out these questions. *Id.*

11. If the juror has taken such oaths as are referred to, he was grossly unfit to sit as a juror. *Id.*

### § 163. *To be tried by the Court. Witnesses may be examined.*

Challenges for cause shall be tried by the Court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

1. Where a Judge, by consent of parties, acts as trier, upon the challenge of a juror to the favor, his rejection of evidence offered in support of the challenge, as immaterial, is final, as would be the decision of a trier on such evidence, and it cannot be reviewed. *Costigan v. Cuyler*, 21 N. Y. (7 Smith) 134.



## ARTICLE II.

## CONDUCT OF THE TRIAL.

SEC. 164. *Proceedings in case a juror become sick.*

165. *Charge to the jury; Court shall furnish in writing, upon request, the points of law contained therein.*

166. *Jury may decide in Court, or retire for deliberation. Duty of the officer in charge.*

167. *Jury may take with them certain papers.*

168. *May come into Court for further instructions.*

169. *When jury are prevented from giving verdict the cause may be again tried.*

170. *While jury are absent the Court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.*

171. *The jury having agreed upon a verdict, shall declare the same.*

172. *Informal or insufficient verdict may be corrected under advice of the Court.*

173. *Verdict shall be recorded in full in the minutes.*

§ 164. *Proceedings in case a juror become sick.*

If, after the impanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the Court may order him to be discharged. In that case, the trial may proceed with the other jurors, or a new jury may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impanneled.

1. The withdrawal of a juror and the continuance of a case thereby, is no ground for reversing a judgment subsequently obtained. *Benedict v. Cozzens*, 4 Cal. 381.

§ 165. *Charge to the jury; Court shall furnish in writing, upon request, the points of law contained therein.*

In charging the jury, the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it shall also inform the jury that they are the exclusive judges of all questions of

fact. The Court shall furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge; or shall sign at the time a statement of such points prepared and submitted by the counsel of either party.

**1. Instructions should conform to the pleadings and the facts.**—Instructions to the jury are properly refused when not warranted by the pleadings. *Thompson v. Lee*, 8 Cal. 275.

**2.** In this case, the answer being insufficient as a denial of the allegations in the complaint, and the Court having instructed the jury to find for plaintiff: *Held*, that the instruction was right—no evidence being required on the part of plaintiff. *Kuhland v. Sedgwick*, 17 Cal. 123.

**3.** An instruction asked for is properly refused when there is no evidence on the question of fact embraced in it. *People v. Harley*, 8 Cal. 390.

**4.** Instructions in civil and criminal cases should be drawn with some slight reference to the case as made by the evidence. *People v. Roberts*, 6 Cal. 217.

**5.** An instruction of the Court to the jury must be adapted to the facts of the case. *People v. Honshell*, 10 Cal. 87.

**6.** Where no question of jurisdiction of Courts is raised by the pleadings, it is error to instruct the jury "that if they believe a certain fact they must find for the defendant, as the existence of that fact will establish a want of jurisdiction over the case," because, as the pleadings stand, such a verdict is a complete bar to another action, to which the plaintiff is entitled in another Court, if the verdict against him was rendered in pursuance of such an instruction. *Fairbanks v. Woodhouse*, 6 Cal. 433.

**7. Questions of fact must be entirely left to the jury.**—It is error for the Court to charge the jury as to a question of fact, or as to the weight of evidence. *Battersby v. Abbott*, 9 Cal. 565.

**8.** The constitutional right of the Court "to state the testimony" to the jury, would hardly authorize a Judge to express his opinion as to its effect. *Seligman v. Kalkman*, 8 Cal. 216.

**9.** Where the plaintiff's case does not depend alone on the evidence mentioned in the instruction requested by the defendant, it was properly refused. *Pearson v. Snodgrass*, 5 Cal. 479.

**10.** A jury should make up their verdict from the facts according to the law as given to them by the Court; and it seems that it is improper for a Court to charge the jury "to take into consideration all of the facts and do equal justice between the parties," inasmuch as an instruction so general in its terms may mislead them. *Per HASTINGS, C. J. Kelly v. Cunningham*, 1 Cal. 365.

**11.** How far it is necessary and proper for the Judge to refer to and comment upon the evidence in the charge, is a question of discretion. *Poler v. N. Y. C. R. R.*, 16 N. Y. 476.

**12.** It is not error for the Judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury. *Althrop v. Wolf*, 2 Hilt. 344.

**13.** The Judge is not at liberty to state his opinion on any question, on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusion thereon; if it is a matter of law, he has no right to leave it to the jury. *Vedder v. Fellows*, 20 N. Y. (6 Smith) 126.

**14. Instructions as to abstract questions of law.**—It is not error for a Court to refuse an instruction asked, stating an abstract or general proposition of law, when it has already so charged the jury as to embrace such proposition, or so much of it as is applicable to the case. *Fairchild v. The California Stage Co.*, 13 Cal. 599.

**15.** Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts. *Thompson v. Paige*, 16 Cal. 77.

**16.** A Judge is bound to instruct a jury upon each proposition of law submitted to him by counsel, bearing upon the evidence. *Zabriskie v. Smith*, 3 Kern. 322.

17. The Court should refuse to instruct the jury on abstract questions of law. *Fowler v. Smith*, 2 Cal. 39; *Id.* 387; *Branger v. Chevalier*, 9 *Id.* 353.

18. It is not incumbent on the Court to instruct the jury upon mere abstract questions of law, irrelevant to the case, as serving only to bewilder and mislead them from the true issue to be determined. *Fowler v. Smith*, 2 Cal. 45.

19. Whether an instruction, giving the general rule, without qualification, be proper or not, depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case. *People v. Arnold*, 15 Cal. 482.

20. It is not error in a Court to refuse to give to the jury an instruction which embraces a question which came properly before the Court, and not before the jury. *Branger & Driard v. Chevalier*, 9 Cal. 353.

21. Court should give or refuse instructions as asked for.—The Court should give or refuse instructions to the jury as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered. *Conrad v. Lindley*, 2 Cal. 172; *Jamson v. Quivy*, 5 *Id.* 491; *Russell v. Amador*, 3 *Id.* 403.

22. Held, that where an instruction asked by defendant, if given entire, would have been erroneous, the Court was not bound to separate the concluding clause and give that by itself, and was therefore right in refusing the instruction. *Smith v. Richmond*, 19 Cal. 476.

23. The Court may refuse to give instructions already substantially given.—The Court may refuse to give an instruction, on the ground that it has been already substantially given by the Court. *Belden v. Henriquez*, 8 Cal. 87.

24. If an instruction be refused for the reason that it has already been given, the reason of the refusal should be stated so as not to mislead the jury. *People v. Ramirez*, 13 Cal. 152.

25. Where equivalent instructions are given and refused, the Court should place its refusal on the ground that equivalent instructions were given. Unless this is done the jury may be misled. *People v. Hurley*, 8 Cal. 390.

### INSTRUCTIONS IN PARTICULAR CASES.

26. Actions affecting real estate.—It was error for the Court to instruct the jury "that where a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature. *McDaniel v. Baca*, 4 Cal. 326.

27. Where the complaint does not charge the mortgagee in possession with negligence or improper conduct in the leasing the mortgaged premises, but requires him to account for the rents he actually received, it is proper in the Court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received, if so leased. *Benham v. Rowe*, 2 Cal. 387.

28. An instruction to the jury "to find for the defendant, as plaintiff has failed to prove a redemption," is clearly erroneous. The question of redemption was the main point in issue. *Battersby v. Abbott*, 9 Cal. 565.

29. In an action for use and occupation, the Court was asked to instruct the jury, "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff, and if the jury believe the defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant," which the Court refused: Held, that in this the Court erred. *Sampson v. Shaeffer*, 3 Cal. 196.

30. In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual inclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the Preemption Laws of the United States, or the Possessory Law of this State. *Bradshaw v. Treat*, 6 Cal. 172.

31. When a private survey is admitted as a diagram, but not as evidence, the Court should clearly explain to the jury the precise purpose and effect of its admission. *Rose v. Davis*, 11 Cal. 133.

32. An instruction to the jury that they must take the grant and map together, and if they believe the land in controversy within the grant, as explained by the map, they will find for the plaintiff: *Held*, to be correct. *Ferris v. Coover*, 10 Cal. 589.

33. It is error for the Court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of that line is of no moment. *Seaward v. Malotte*, 15 Cal. 307.

34. Where the defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. Such instruction does not imply that plaintiffs can recover, even if they do not establish, *prima facie*, a title. *Busenius v. Coffee*, 14 Cal. 91.

35. In ejectment, where the title is of record and wholly documentary, the Court may declare the effect of the papers offered by plaintiff, and instruct the jury that plaintiff has made out his title, if they believe the land to be within the boundaries of a grant under which plaintiff claims. *McGarvey v. Little*, 15 Cal. 27.

36. In ejectment, the Court having admitted in evidence, as sufficiently proven, the mesne conveyances through which plaintiff traced title—the defendants being mere trespassers—charged the jury “that the written evidence of title, together with the admissions of the parties, authorized them to find for the plaintiff, since the execution of the papers had been passed upon by the Court: *Held*, to be no objection to this instruction that it does not leave the execution and delivery of the conveyances to the jury; that the sufficiency of their execution was a matter addressed solely to the Court, and that—no question being raised during the trial as to their delivery and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an announcement of the law as to the effect of the conveyances and of the admissions of the defendants. *Stark v. Barrett*, 15 Cal. 373.

37. *Held*, further, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no such objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Id.*

38. Ejectment for land as a homestead. The husband alone had executed a deed to defendant. There was evidence tending to show that the premises were never occupied by plaintiffs with the intention of making them the homestead, and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The Court below submitted a series of questions to the jury for a special verdict, the first of which was: Did the plaintiffs ever dedicate and set apart the real estate described in the complaint as a homestead, by living upon it with the intention so to dedicate it? and told the jury if they answered this question in the negative, the answer would constitute their entire verdict, but if they found in the affirmative, they should then proceed to answer the other questions: *Held*, that such direction was proper, as a negative answer to this question was conclusive against a recovery, and that such directions are convenient in practice, and no abuse of discretion. *Broadus v. Nelson*, 16 Cal. 79.

39. Where, in ejectment, plaintiff asked the Court to instruct the jury “that lapse of time does not constitute an abandonment, but that it consists in a voluntary surrender and giving up of the thing by the owner, because he no longer desires to possess it, or thereafter to assert any right or dominion over it;” and the instruction was given with the qualification that lapse of time constitutes the material element in the question of abandonment: *Held*, that it would be more exact to say that lapse of time constitutes a material element to be considered in deciding the question of abandonment, but that the instruction given and the qualification are, in connection, the same in effect. *Lawrence v. Fulton*, 19 Cal. 683.

40. **Actions concerning mining claims.**—In an action for diverting water from plaintiff’s ditch—plaintiff and defendants both having ditches supplied from the same stream, the plaintiff’s rights being prior and paramount—defendants asked the Court to instruct the jury that if defendants had brought water from foreign sources and emptied it into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, less such amount

as might be lost by evaporation and other like causes. The instruction was given with the explanation that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator: *Held*, that the explanation was proper—the concluding words of the instruction being too general and indefinite. *Burnett v. Whitesides*, 15 Cal. 35.

41. In an action for diverting water from the plaintiff's ditch, and where both parties claimed, in part, the waters of the same stream: *Held*, that the following instruction was properly given by the Court to the jury: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbitt's creek more water than he was entitled to at the precise time that such deficiency existed." *Brown v. Smith*, 10 Cal. 508.

42. Also, where the Court instructed the jury that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury, that it was incapable of directing the waters of the creek, then plaintiff cannot recover. *Id.*

43. In an action for a mining claim, when the defendant asked for an instruction to the jury "that if the plaintiff had abandoned the claim, and did not intend to return and work it before the commencement of the suit," and the Court gave the instruction "subject to the seventeenth section of the Statute of Limitations:" *Held*, that the qualification to the instruction was error. *Davis v. Butler*, 6 Cal. 510.

44. Where the Court instructed the jury, in such action, that "where an abandonment is sought to be established by the act of the party, the intention not to return, his abandonment is as complete, if it exist for a minute, or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years, provided there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:" *Held*, that the question of abandonment was fairly left to the jury. *Waring v. Crow*, 11 Cal. 366.

45. In suit for damages for an entry upon mining claims, and for perpetual injunction, etc.: *Held*, that it was error for the Court below to charge the jury that if they believed no injury or damage was done by defendants to plaintiffs, they would find for defendants; that such charge was calculated to mislead, inasmuch as the law presumes damages from a trespass, and under the charge, the jury might have decided the case upon this want of proof of plaintiff's damages, instead of absence of proof of their title. *Attwood v. Fricot*, 17 Cal. 37.

46. **Actions involving questions of fraud.**—Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. The Court, in such case, may direct the jury how to find or set aside the verdict, if they find to the contrary. *Chenery v. Palmer*, 6 Cal. 119.

47. It was error in the Court below to refuse to instruct the jury that if they believed the receipt, specified in the deed for \$3,000, was obtained by fraud, they were authorized to find for the defendant. No case in the history of jurisprudence will sustain that ruling. *McDaniel v. Baca*, 2 Cal. 326.

48. Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule: *Held*, that it was error for the Court to instruct the jury, "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder, or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. The fraud is as complete without the delivery as with it. *Fiak v. His Creditors*, 12 Cal. 281.

49. It is error to instruct a jury, in a civil case of imputed fraud, that if they have a doubt of the guilt of the party charged, they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other. *Ford v. Chambers*, 19 Cal. 143.

50. **Actions for libel.**—Of the proper matter of a charge in an action for libel. *Fry v. Bennett*, 3 Bosw. 200, 243.

51. The jury were told that if the necessary effect of the publication was to diminish the plaintiff's respectability, and abridge his comforts, by exposing him to disgrace and ridicule; if its tendency was to impair his condition, or alter his position in society for the worse, it was libelous, and that there could be little doubt but that the publication in question was libelous; that the whole scope and tendency of it was libelous: *Held*, no ground for a new trial. It was expressing an opinion as to whether, or not, the publication in question was libelous; but, as it was coupled with a definition sufficient to enable the jury to know what in law constituted a libel, it was submitting it to them to pass upon, accompanied with an opinion of the Judge that it was libelous, which might follow, or not, as they thought proper. *Grah. on New Tr. 426; Cook on Def. 171.*

52. In an action for libel, the charge stated that, where the circumstances of the case warranted it, a jury had a right to increase the amount of damages as a punishment to the slanderer; that it was not usual to give vindictive damages, or smart money, except in cases where, in addition to the legal presumption of malice which the law inferred from want of truth in the defamatory matter, it appeared that the publication had been dictated by a purely malevolent motive: *Held*, proper; it was merely saying that, in a proper case, the jury had the right to give vindictive or peremptory damages. *Taylor v. Church, 1 E. D. Smith, 279; Hunt v. Bennett, 4 E. D. Smith's C. P. R. 647.*

53. **Various causes of action.**—The action was against surgeons "for malpractice, by which amputation became necessary." The Court charged, erroneously, "that if they believe from the evidence that the defendants were guilty of negligence, carelessness, or inattention, in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." The action was not brought for bodily pain or suffering. *Moore v. Teed, 3 Cal. 190.*

54. Where the vendee of goods is to pay part of the purchase money to the creditors of his vendor, this creates no trust in the goods sold in favor of such creditors; therefore, in an action to recover such goods, the following instruction to the jury is improper: "If the jury believe, from the testimony, that the agreement between Stevens & Markling, the vendors of the plaintiff, was that the plaintiff was to pay certain of the debts of his vendors out of said goods, then that such sale, as against the other creditors of the vendors, is fraudulent." *Wellington v. Sedgwick, 12 Cal. 469.*

55. Where defendants were sued as factors, although no claims for commissions, etc., were set out as a counter claim, it was error for the Court to charge the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, and that the defendants were liable for the value of the goods at the time of demand. *Labert v. Chauviteau, 3 Cal. 463.*

56. In an action on guaranty, though it is error in terms to charge the jury, if they find for the plaintiff, to assess as damages the amount of the penalty fixed in the guaranty; yet, if the plaintiff's damages, if any, must exceed the penalty, the direction must be regarded as limiting the verdict, and the defendant is not injured by the instruction. *Jones v. Post, 6 Cal. 102.*

57. Where, in a suit on an account stated, the only evidence was that of a witness, who said defendant, on presentation of the account, admitted it to be correct, and promised to pay it, and the Court charged the jury that, if they believed the testimony of the witness, they must find for the plaintiff the amount claimed, and they so found: *Held*, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry v. Sickles, 13 Cal. 427.*

58. Plaintiff sues on a contract of sale of cattle, to be delivered within "three weeks, at the furthest"—the consideration money being paid—adding also the common counts. Complaint avers the breach of the agreement, by failure to deliver the cattle: *Held*, that it was not error in the Court below instructing the jury, that if defendant did not have the cattle ready for delivery at the time mentioned in the contract, they should find for plaintiff; and in assessing damages, they might find the purchase money, with ten per cent. interest, or the highest market price of the cattle to the time of trial. *Maker v. Riley, 17 Cal. 415.*

59. It is not error to instruct a jury that, if sufficient time had elapsed between the dealings of the plaintiffs with the old firm, and their subsequent transactions

with the new firm, to put a reasonable man on inquiry, they might be treated as new dealers. *Treadwell v. Wells*, 7 Cal. 260.

60. In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof, as to the right, or title, or possession, of plaintiff, and the taking or interference by defendant, being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Beekman v. McKay*, 14 Cal. 250.

61. In an action against an administrator, the Court should, if asked, charge the jury as to the statute time within which the action could be brought when the claim is rejected. *Benedict v. Haggin*, 2 Cal. 381.

62. It is error in the Court to refuse to instruct the jury in accordance with the provisions of the one hundred and thirty-fifth section of the Act to Regulate the Settlements of the Estates of Deceased Persons, when requested so to do, and the evidence shows that it is proper and relevant. *Id.* 385.

63. Of the proper terms of a charge to the jury in trial of a defendant for violation of the Pilot Laws. *People v. Francisco*, 10 Abb. R. 30.

64. Charge in an action for wrongful act, etc., causing death of plaintiff's intestate. *Althof v. Wolf*, 2 Hilt. 344.

65. In an action for a tort, the Judge submitted to the jury certain items of damages as proper for their consideration separately, and also "what is the interest on the sum total of the above damages from the commencement of this action, in June, 1846, up to the date of the trial:" *Held*, not erroneous. The jury were not instructed to allow interest, but its allowance was submitted to their discretion. In general, in actions *ex delicto*, it is in the discretion of the jury whether to allow interest by way of damages or not. *Walrath v. Redfield*, 4 Hilt. 457.

66. Although negligence on the part of the carrier is not to be presumed from the mere happening of an accident, except where the facts, proved in the particular case, fully warranted the presumption; yet a verdict for plaintiff, which is supported by ample evidence, is not to be disturbed because the jury were charged that "the fact of this accident occurring was of itself presumptive evidence of negligence." The charge is not to be construed as laying down a general principle, which would make it a mere abstraction, not called for by the exigencies of the case, provided any other interpretation is admissible. *Curtis v. Rochester and Syracuse R. R. Co.*, 4 E. P. Smith's (18 N. Y.) R. 534.

67. **Miscellaneous decisions.**—A Court is not bound to give an instruction erroneous on its face, even though the error be insufficient to reverse the judgment, no injury being done. *Visher v. Webster*, 13 Cal. 58.

68. It is the duty of the Court to decide upon the admissibility of a witness objected to for interest, and it is error to refer the question to the jury, upon the evidence, with instructions to disregard it, if they believe the witness interested. *Tabor v. Stanields*, 2 Cal. 240.

69. A rule of Court requiring counsel to file and submit to the Court any instructions they may offer, before the argument is closed, to the jury, does not operate where the cause is submitted without argument. *Finney v. Endicott*, 5 Cal. 102.

70. On cross-examination, the plaintiff was permitted to show by the witness that he did not believe in the existence of a Supreme Being, who will punish false swearing. And the Judge charged the jury that such fact might go to the credit of the witness: *Held*, that as the jury could not have understood from the charge that, as matter of law, the witness' disbelief in the existence of a Supreme Being, who will punish false swearing, affected his credibility; but only if they were of the opinion it ought to render his evidence less reliable, they might so regard it; the charge was correct. *Staubro v. Hopkins*, 28 Barb. 267.

71. See "Appeal," *post*, § 336.

§ 166. *The jury may decide in Court, or retire for deliberation. Duty of officer in charge.*

After hearing the charge, the jury may either decide in Court,

or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the Court. The officer shall, to the utmost of his ability, keep the jury together separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the Court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

§ 167. *Jury may take with them certain papers.*

Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause; or copies of such papers as ought not, in the opinion of the Court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves, or any of them; but none taken by any other person.

§ 168. *May come into Court for further instructions.*

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into Court. Upon their being brought into Court, the information required shall be given in the presence of, or after notice to, the parties or counsel.

1. After the jury have once retired, it is error to allow them to come into Court and receive instruction in the absence of the parties or their counsel. *Redman v. Yontz*, 5 Cal. 148.

2. Such instructions will be considered important, if the contrary is not shown, from the very fact that the jury have asked for them. *Id.*

3. The Judge has no right to intimidate a jury, who are unable to agree upon a verdict, or to affect their deliberations. *Green v. Telfair*, 11 How. Pr. R. 260.

§ 169. *When prevented from giving verdict, the cause may be again tried.*

In all cases where a jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the Court shall direct.



§ 170. *While jury are absent, Court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.*

While the jury are absent, the Court may adjourn, from time to time, in respect to other business; but it shall nevertheless be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered, or the jury discharged. The Court may direct the jury to bring in a sealed verdict, at the opening of the Court, in case of an agreement during a recess, or adjournment for the day. A final adjournment of the Court for the term shall discharge the jury.

1. Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon the verdict, seal it up, and give it to the officer in charge of them—the Clerk being absent—and request him to give it to the Clerk, which is done; and after the meeting of the Court, the following morning, the verdict is opened, in the presence of the jury, and read by the Clerk, without exception: *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer, left the verdict as much in the possession of the Court itself as if it had been directly delivered to the Clerk. *Paige v. O'Neal*, 16 Cal. 483.

2. Nor will it make any difference when the names of the jurors were not called, and they were not asked whether they had agreed upon their verdict, where the parties were present, and took no exception at the time; and where it is not pretended that the verdict entered differs from the one sealed up, or that the result is in any respect affected by the omission. *Id.*

3. The opportunities of tampering with jurors after separation are so numerous, and in important cases the temptation is so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. *Id.*

§ 171. *The jury having agreed upon a verdict, shall declare the same.*

When the jury have agreed upon their verdict, they shall be conducted into Court by the officer having them in charge. Their names shall then be called, and they shall be asked by the Court, or the Clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same.

1. There is no right to poll a jury in a civil case after the verdict has been recorded; nor before, unless there are circumstances of suspicion attending the delivery of the verdict. *Blum v. Plete*, 20 Cal.

2. But in all cases it rests with the discretion of the Court. *Id.*

3. The jury, acting as a body, speak through their foreman, and his assent is conclusive upon all, unless a disagreement to the record be expressed at the time. *Id.*

4. The jury may be polled at the instance of either party, and then any of them may dissent from it, (7 Johns. 32; 3 Cow. 23; 11 Pick. 501); in which case, the jury may be again sent out. 2 Wend. 352; 3 Johns. 255.

5. A party against whom a verdict is declared, has an absolute right to poll the jury at any time before the verdict is entered. In polling the jury, the inquiry is:

"Is this your verdict?" And the Court cannot be required to have the question put: "Is this your verdict against each and both of the defendants?" *Labar v. Koplín*, 4 Coms. 547.

§ 172. *Informal or insufficient verdict may be corrected under advice of the Court.*

If the verdict be informal or insufficient, in not covering the whole issue or issues submitted, the verdict may be corrected by the jury under the advice of the Court, or the jury may be again sent out.

1. It is competent for the Court to instruct the jury to amend their verdict as to form, not affecting the substance, and in such manner as to be unexceptionable in law. *Truebody v. Jacobson*, 2 Cal. 284.

2. The Court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties. *Perkins v. Wilson*, 3 Cal. 139.

3. The verdict may conform to the issues. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Ross v. Austill*, 2 Cal. 192.

4. After the jury have pronounced their verdict, they may alter and correct it, before it is received and recorded. And the Court may also send them out again to reconsider their verdict, if it appears to be a mistaken one, before it is received. 7 Johns. 32.

5. The verdict of a jury may be amended or corrected so as to conform to the facts, and to the real intentions of the jury, either by certificate of the Judge or otherwise. Where, however, the slightest doubt exists as to what transpired on the trial, or if any exist that the whole case has been disposed of by the Court and the jury, an amendment should not be allowed. *Burhaus v. Tibbits*, 7 How. Pr. R. 21.

§ 173. *Verdict shall be recorded in full in the minutes.*

When the verdict is given, and is not informal or insufficient, the Clerk shall immediately record it, in full, in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case.

1. The Court shall direct the verdict of a jury to be recorded as rendered by it. That should be treated as the verdict which the jury actually brings in. *Moody v. McDonald*, 4 Cal. 297.

2. Where an informal verdict is received and recorded by consent of the plaintiff, and judgment in form is afterwards entered thereon, on appeal the informality will be disregarded. *Treadwell v. Wells*, 4 Cal. 263.

## ARTICLE III.

## THE VERDICT.

SEC. 174. *General and special verdicts defined.*

175. *When general or special verdicts may be rendered.*

176. *Verdict in actions for the recovery of money, or on establishing counter claim.*

177. *Verdict in actions for the recovery of specific personal property.*

178. *Entry of verdict.*

§ 174. *General and special verdicts defined.*

The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.

N. Y. Code, § 260.

1. The verdict must be confined to the matters put in issue by the pleadings. *Benedict v. Bray*, 2 Cal. 256; *Truebody v. Jacobson*, Id. 285.

2. The verdict may conform to the issues. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Ross v. Austill*, 2 Cal. 192.

3. The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the Clerk. *Reynolds v. Harris*, 8 Cal. 618.

4. The report of a referee on the facts of a case will be considered the same as the verdict of a jury. *Walton v. Minturn*, 1 Cal. 362.

5. A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results. *Suñol v. Hepburn*, 1 Cal. 258.

6. A verdict arrived at, where each juror sets down a sum according to his own judgment, and the aggregate should be divided by twelve, and the quotient should be returned as the verdict, is irregular, and will be set aside, unless such means were merely adopted to arrive at a proper result, and they subsequently agreed on that sum. *Wilson v. Berryman*, 5 Cal. 45; *Conklin v. Hill*, 2 How. Pr. 6.

7. A joint verdict against the defendants answering and a defaulting defendant, is conclusive against all the defendants, when a separate verdict has not been demanded. *Anderson v. Parker*, 6 Cal. 197.

8. The verdict should comprehend the whole issue or issues submitted to the jury, otherwise the judgment on the verdict will be subject to be reversed. 21 Wend. 19, 90; 1 Ld. Raym. 324.

9. **Verdict conclusive upon facts found.**—The finding of a jury, or of the Court below, acting as a jury, upon a question of fact, is final and conclusive. *Perry v. Cochran*, 1 Cal. 180.

10. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 145.

11. Where a verdict is general, its effects will be limited to such issues as necessarily controlled the action of the jury. *Kidd v. Laird*, 15 Cal. 161.

12. A verdict found on any fact or title distinctly put in issue, is conclusive in another action between the same parties, or their privies, in respect of the same fact or title. *Id.*

13. But the fact or title must be material and relevant; must be distinctly in issue; must be tried by the jury, and constitute the basis of their verdict; and, unless specially found, must have been necessarily passed upon by the jury. *Id.*

14. A special verdict settles the facts, and the Court by its judgment pronounces the conclusion of law upon the facts found. If the Court errs in this respect, the error may be reviewed without any motion for a new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. *People v. Hill*, 16 Cal. 117.

15. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate Court. *Garwood v. Simpson*, 8 Cal. 108; *Duff v. Fisher*, 15 Id. 380.

16. If the statement discloses no refusal on the part of the Judge of the Court below to charge the jury on any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts of the case. *George v. Law*, 1 Cal. 364.

17. The verdict of a jury in a chancery case is only advisory to the Chancery of this Court. *Still v. Saunders*, 8 Cal. 281.

18. In chancery cases, the Court below may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 84.

19. **Effect of verdict on defects in pleading.**—The general rule as to the effect of a verdict upon defects in pleading is, that whatever facts are not expressly stated, which are so essential to a recovery that without proof of them on the trial a verdict could not have been rendered under the direction of the Court, then the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts, in fair and reasonable intendment. *Garner v. Marshall*, 9 Cal. 268.

20. A defective allegation of a fact may be cured by default or verdict, but not so the entire absence of any allegation whatsoever. *Hentsch v. Porter*, 10 Cal. 555.

21. Where a declaration states a condition precedent, and fails to aver performance, the defect must be urged on demurrer; it comes too late after verdict. *Happe v. Stout*, 2 Cal. 461.

22. An omission to allege delivery, in an action on a bond, can be taken advantage of only on demurrer, and not after verdict. *Garcia v. Satrustegui*, 4 Cal. 244.

23. Defects in an indictment are not cured by verdict, but may be taken advantage of by motion in arrest of judgment. *People v. Wallace*, 9 Cal. 32.

24. The facts which will after verdict be presumed to have been proven, are those which, although entirely omitted to be stated in the complaint, are so connected with the facts alleged, that the facts alleged cannot be proved without proving the facts not alleged. *Addington v. Alden*, 11 Wend. 374; *Brown v. Harmon*, 21 Barb. 512.

25. **Jurors cannot impeach their own verdict.**—It is a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen

cannot be received to defeat his own verdict; and in a criminal case, the affidavit of a jurymen, made after verdict, that he had formed and expressed an opinion before the trial, cannot be received on a motion for a new trial. *People v. Baker*, 1 Cal. 403.

26. The affidavit of jurors will not be allowed to contradict their verdict. *Castro v. Gill*, 5 Cal. 40; *Ambly v. Dickhouse*, 4 Id. 102; *Wilson v. Berryman*, 5 Id. 44.

27. It seems that the testimony of the Sheriff is competent to disclose what transpires in the jury-room. *Wilson v. Berryman*, 5 Cal. 44.

28. Affidavits of counsel and others on information respecting the misbehavior of the jury while considering their verdict, are not admissible to impeach the verdict. *People v. Hartung*, 8 Abb. 132; *People v. Wilson*, Id. 137.

29. The appellate Court must infer in favor of the verdict below, unless error is clearly manifest. *Allen v. Phelps*, 4 Cal. 259.

30. Informal and insufficient verdict may be corrected. See § 172, and notes.

31. Grounds upon which a verdict will be set aside. See § 193, and notes.

### § 175. When a general or special verdict may be rendered.

[1854.] In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the Court may direct the jury to find a special verdict, in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict of finding shall be filed with the Clerk, and entered upon the minutes. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.

N. Y. Code, §§ 261, 262.

1. The Court may direct a special verdict to be entered in the action. *Burritt v. Gilson*, 3 Cal. 396.

2. A general verdict will conclude all parties who do not answer separately, or demand separate verdicts. *Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 Id. 409.

3. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, however, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 70.

4. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and the defendants being in possession. *McGarvey v. Little*, 15 Cal. 31.

5. A joint verdict against the defendants answering and a defaulting defendant, is conclusive against all the defendants, when a separate verdict has not been demanded. *Anderson v. Parker*, 6 Cal. 197.

6. Where, on a suit against defendants as members of a quartz company, one defendant pleads that he is not a member of the company, and the finding of the Court is that the allegations of the complaint are true, and that said defendant was a member of the company as to plaintiff Park, the finding supports a judgment for plaintiff. *Park v. Hinds*, 14 Cal. 418.

7. If the jury fails to find the fact of a lien, the Court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. Hauss-hijo*, 4 Cal. 186.

8. A special verdict settles the facts, and the Court by its judgment pronounces the conclusion of law upon the facts found. If the Court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. *Allen v. Hill*, 16 Cal. 117.

9. On the rendition of a special verdict, the trial is terminated, and notice of motion for new trial must be given within the statutory time, or the proceedings based upon such notice will be disregarded. *Id.*

§ 176. *Verdict in actions for recovery of money, or on establishing a counter claim.*

When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery.

N. Y. Code, § 263. See § 47, "Counter claim."

1. The theory of the law is not that the party recover the particular note or chose in action, as is commonly imagined, but that he recovers damages for the nonperformance of the contract; and in case of failure to pay money due, the true damage is the amount of money owing, and the interest which was agreed upon. *Guy v. Franklin*, 5 Cal. 417.

§ 177. *Verdict in actions for the recovery of specific personal property.*

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

N. Y. Code, § 261.

1. Section one hundred and seventy-seven of the Practice Act applies only when the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit. *Guiaca v. Atwood*, 8 Cal. 446.

2. An officer attaching goods under civil process, is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Daumiel v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Id. 75.

3. In an action of replevin by W., it appeared on trial that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the Court gave judgment for a return of the property to the defendants: *Held*, that there was no error in the judgment. *Waldman v. Broder*, 10 Cal. 379.

4. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

5. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Id. 565.

### § 178. *Entry of verdict.*

Upon receiving a verdict, an entry shall be made by the Clerk in the minutes of the Court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

N. Y. Code, § 264; see also, § 173, *supra*, and notes.

1. If the Court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error. *Kilburn v. Ritchie*, 2 Cal. 145.

2. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for a new trial. *Hutchinson v. Bours*, 13 Cal. 50.

3. A Court may, in term time or vacation, order judgment on a verdict rendered and recorded, if the motion for new trial were taken under advisement. *Id.*

4. The judgment, in pursuance of the verdict, is the act of law upon record facts, and follows as a matter of course, unless the Court intervene. *Id.*

5. Counsel, in the trial of a cause, cannot object that the Court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the Judge as would, in his judgment, be sufficient to present all the questions raised by the pleadings. *Marius v. Bicknell*, 10 Cal. 224.

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## CHAPTER V.—*Trial by the Court.*

SEC. 179. *When and how trial by jury may be waived.*

180. *Decision on trial of issue of fact by the Court.*

181. *A reference may be ordered, when.*

### § 179. *When and how trial by jury may be waived.*

Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract; and, with the assent of the Court, in other actions, in the manner following:

1st. By failing to appear at the trial.

2d. By written consent, in person or by attorney, filed with the Clerk.

3d. By oral consent in open Court, entered in the minutes. The Court may prescribe by rule what shall be deemed a waiver in other cases.

1. **Generally.**—The right of trial by jury may be waived in the mode prescribed by law. *Russell v. Elliott*, 2 Cal. 245.

2. The right of trial by jury cannot be waived by implication, but may be in the mode prescribed by law. *Smith v. Pollock*, 2 Cal. 92; *Russell v. Elliott*, Id. 245; *Exline v. Smith*, 5 Id. 112.

3. The Legislature alone can determine in what cases the right of trial by jury may be waived. *Exline v. Smith*, 5 Cal. 112.

4. A party having filed an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages should be ascertained as prescribed by the statute; and an order of reference is no violation of the right to a trial by jury. *Russell v. Elliott*, 2 Cal. 245.

5. Parties to a suit in chancery are not entitled to a trial by jury. *Walker v. Sedgwick*, 5 Cal. 192; questioned in *Duff v. Fisher*, 15 Id. 376.

6. It would seem that a party cannot try his cause before a Judge without objection, and after losing it, complain that the case was not tried by a jury. *Smith v. Brannan*, 13 Cal. 107.

7. **First subdivision.**—The failure of either party to appear on the trial of a civil case, operates as a consent on his part that the issue be tried by the Court without a jury. But such failure to appear does not authorize the trial to be had by a jury of less than twelve persons. *Gillespie v. Benson*, 18 Cal. 409.

8. A less number than twelve persons does not constitute a legal jury, without the consent of the adverse party; and such consent must be express, and entered at the time in the minutes of the Court, and cannot be inferred from the mere absence of the party. *Id.*

Sec. 180. Upon a trial of issue of fact by the Court, judgment shall be entered in accordance with the finding of the Court; and the finding, if required by either party, shall be reduced to writing and filed with the Clerk. In the finding filed the facts found and the conclusions of law shall be separately stated. In such cases no judgment shall be reversed on appeal for want of a finding in writing at the instance of any party who at the time of the submission of the cause shall not have requested a finding in writing and had such request entered in the minutes of the Court; nor in cases tried by the Court, by a Commissioner, or a referee, shall the judgment be reversed on appeal for defects in the finding unless exceptions be made in the Court below for a defect in the finding; and in cases of exceptions for defective findings, the particular point or issue upon which the party requires a finding to be made, or the particular defect to be remedied, shall be specified and particularly designated; and upon failure of the Court to remedy (or, when tried by a Commissioner or referee, to cause to be remedied by such Commissioner or referee) the alleged defect, the party moving shall be entitled to his exceptions, and the same shall be settled by the Judge as in other cases provided, that when any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case no finding of facts shall be made, unless such statement shall fall to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not material to the agreed statement. (Smith) R. 491.

not operate as an appearance at the trial, under the one hundred and seventy-Crowe, 4 Cal. 112.

on the trial of an action of replevin, under the one hundred and seventy-Carson, 10 Cal. 178.

to appear when the cause is called for trial to try it without a jury. *Doll v.*

ended was specific performance of a claim showed a case for damages, but was tried before a Judge without a jury, had been entered upon, the defendant found, among others, that the cause denied, and the judgment was for the defendant deemed to have waived a jury trial. is absolute, and any decision of the trial would be plainly erroneous. But it is a fact that the defendant is entitled to it enters voluntarily upon the trial, he would ordinarily, no doubt, be allowed. In this case, the defendants not allowed by jury until after the Judge had stated was insisted upon only as one

If the defendants intended to insist upon a trial by jury, they should have raised the issue at least should have persisted in the

§ 180. Decision on trial of issue of fact by the Court.

Upon the trial of an issue of fact by the Court, its decision shall be given in writing, and filed with the Clerk, within ten days after



the trial took place. In giving the decision, the facts found, and the conclusions of law, shall be separately stated. Judgment upon the decision shall be entered accordingly.

1. **Directory.**—This section is directory as to the time required for the written decision to be filed. *Vermule v. Shaw*, 4 Cal. 216.

2. **This section applicable to cases both at law and in equity.** The Act of 1861, regulating appeals, changes the rule laid down in *Walker v. Sedgwick*, (5 Cal. 192) and makes the statute, as to findings of fact and conclusions of law, applicable to cases both in law and in equity. *Lyons v. Lyons*, 18 Cal. 447.

3. The statute which requires, that upon the trial of an issue of fact by the Court, the decision shall state separately the facts and conclusions of law, does not apply in chancery cases. *Walker v. Sedgwick*, 5 Cal. 192.

4. *Walker v. Sedgwick* (5 Cal. 192) only decides that, under the Practice Act, the rule requiring the Court to find its conclusions of law and fact does not apply to equity cases, and does not conflict with our decision here. But we doubt that case, and leave the question of overruling it open. *Duff v. Fisher*, 15 Cal. 375.

5. **May refer to the pleadings, when.**—The findings of a Court sitting as a jury may refer to the pleadings for the facts found, provided the reference is sufficiently distinct, and the facts are sufficiently stated in the pleadings. *McEwen v. Johnson*, 7 Cal. 258.

6. The findings of the Court may refer to the pleadings. As for instance, it would be sufficient to find that the promissory note, mortgage, or other instrument, set forth in the complaint, was executed by the parties, and at the time as therein alleged; and so with other matters alleged, which are established by the evidence. But in all such cases, the reference should be distinct and pointed, so as to leave no doubt as to what particular facts are intended. *Breeze v. Doyle*, 19 Cal. 101.

7. **Sufficiency, test of.**—The true test of the sufficiency of the findings of a Court is this: Would they answer if presented by a jury in the form of a special verdict? *Id.*

8. **Sufficient findings.**—Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the Court is, that the allegations of the complaint are true, and that said defendant was a member of the company as to plaintiff Park, the finding supports a judgment for plaintiff. *Park v. Hinds*, 14 Cal. 415.

9. In suit on a note and mortgage—the answer not denying the execution thereof—the decree recited, among other things, that the Court had duly considered the premises, and that “it appears from the note and mortgage sued upon, that there was due plaintiff at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of \$2,000;” it is ordered, etc.: *Held*, that this constitutes a sufficient finding of facts to support the decree—amounting, as it does, to an indirect finding of the substantial matters in the complaint, to wit: the execution and delivery of the note and mortgage. *Holmes v. West*, 17 Cal. 623.

10. In an action of ejectment against two persons, where one of the defendants had previously surrendered the possession of the premises to his codefendant, this fact is sufficient to support the finding of the Court, that the possession was in one and not in the other. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

11. **Insufficient findings.**—When a motion is tried by the Court which involves an issue of fact, and the facts are neither found by the Court, nor a statement of facts agreed upon by the parties, although the judgment be taken by consent *pro forma*, and without prejudice, it cannot stand on appeal. *Semple v. Benkey*, 2 Cal. 321. •

12. Where the declaration was upon a note, and there was but one count, and the Court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: *Held*, that the finding was against the averment, and could not support this judgment. *Lewis v. Myers*, 3 Cal. 475.

13. The findings of a Court stating that the material allegations in plaintiff's

complaint and replication are true, and that the material allegations in defendant's answer are not true—where the complaint alleges in one count money lent, money laid out and expended by plaintiff for the use of defendants and for work and labor, and in the second count alleges an indebtedness upon an account stated—are defective and ground for reversal of the judgment on appeal. *Breeze v. Doyle*, 19 Cal. 101.

14. **When finding not necessary.**—There is no necessity of a finding as to a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer so as to raise an issue. *Swift v. Muggridge*, 8 Cal. 445.

15. **Law and fact to be stated separately.**—The Court below, sitting as a jury, must find separately the facts and conclusions of law. A verdict insufficient in this particular will be reversed. *Brown v. Groves*, 1 Cal. 111.

16. **When, will not be reviewed on appeal.**—The findings of fact in the Court below will not be reviewed on appeal, unless there was a motion for a new trial; and this, whether the case be in equity or at law, tried by a jury or by the Court. *Gagliardo v. Hoberlin*, 18 Cal. 394.

17. The Supreme Court will not review the findings of the Court below in an equity cause upon a question of fact, if the party objecting to the finding and appealing does not move for a new trial, and appeal from the order overruling the motion. *Deputy v. Stapleford*, 19 Cal. 302; *Regla v. Martin*, Id. 474.

18. Upon the trial of an issue of fact by the Court, the statement of facts must be made out and filed, as required by the one hundred and eightieth section of the Practice Act, or the appeal will be dismissed. *Russell v. Amador*, 2 Cal. 305.

19. An objection that the finding is qualified by the words, "as to plaintiff, Park," and that the facts showing this relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. *Park v. Hinds*, 14 Cal. 415.

20. When a jury has been waived by the parties, and the Court find the facts, the facts so found have the same legal effect as if found by a jury, and not being the subject of review in this Court are therefore conclusive. *Wheeler v. Hays*, 3 Cal. 285.

See Statute cited under § 333, *post*.

21. **Generally.**—Where a cause is tried by a Judge alone, without a jury, the record must disclose a finding by him of the facts, and a statement of his conclusions of law upon the case. *Hoagland v. Clary*, 2 Cal. 474.

22. Without such finding and statement, there is no basis to support the judgment. *Id.*

23. A jury was waived by the parties, and the case submitted to the Court; the trial made some progress, when, on motion of plaintiff's attorney, the case was referred, "to ascertain the damages sustained by plaintiff;" *Held*, the case having been submitted to the Court, it was the duty of the Court to find upon the facts adduced by the parties, and not the facts presented in a referee's report. *Geeseke v. Brannan*, 2 Cal. 517.

24. The intention of the act is, that the decision of the Court upon the facts shall form the basis of the judgment in like manner as the verdict of a jury. *Russell v. Amador*, 2 Cal. 305.

25. This law is not merely directory, and the Court will not destroy or impair its efficacy. *Id.*

26. The finding of a Court, like the verdict of a jury, is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the Clerk. *Reynolds v. Harris*, 8 Cal. 617.

27. The finding of a Court, like a special verdict of a jury, must, taken in connection with the pleadings, support the judgment. *Swift v. Muggridge*, 8 Cal. 445.

28. The reasons given by a Judge in his findings are no part of the judgment. The point decided is the thing fixed by the judgment. *Burke v. Table Mountain Water Co.*, 12 Cal. 403.

29. A special finding on the question of fraud should be always taken so as to keep it distinct from the main subject of controversy. *Davis v. Robinson*, 10 Cal. 411.

30. Where a jury is waived, and the cause tried by the Court, the Court should find the facts, and not merely state the proofs. *Heredink v. Holton*, 16 Cal. 103.

31. A Court cannot properly, even upon consent of parties, pass upon questions not raised by the written allegations of the pleadings. *Boggs v. Merced Mining Co.*, 14 Cal. 279.

32. In ejectment against several defendants occupying different portions of the land sued for, some of whom answer and others make default, and none appearing on the trial, the Court may make a general finding and enter a joint judgment against all the defendants for possession of the land and costs. *Lick v. Stockdale*, 18 Cal. 219.

33. Defective findings, or absence of them, do not render a judgment a nullity; that only constitutes grounds for reversal on appeal. *Breeze v. Doyle*, 19 Cal. 101.

### § 181. *Reference may be ordered, when.*

On a judgment upon an issue of law, if the taking of an account be necessary to enable the Court to complete the judgment, a reference may be ordered.

## CHAPTER VI.—*Of references, and trial by referees.*

### SEC. 182. *Reference ordered upon agreement of parties, in what cases.*

183. *Reference ordered on motion, in what cases.*

184. *Number of referees, qualifications, etc.*

185. *Either party may object; grounds of objection.*

186. *Objections, how disposed of.*

187. *Referees to report within ten days—effect of—how excepted to, etc.*

### § 182. *Reference ordered upon agreement of parties, in what cases.*

A reference may be ordered upon the agreement of the parties, filed with the Clerk or entered in the minutes: 1st. To try all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon; 2d. To ascertain a fact necessary to enable the Court to proceed and determine the case. *Section 182, Code of Civil Procedure.*

1st. To try all of the issues in an action or proceeding, whether of fact or of law; and to report a judgment thereon.

2d. To ascertain a fact necessary to enable the Court to proceed and determine the case.

1. **Order of Court is necessary.**—An order of Court is necessary to constitute a reference under the Code; and no reference would be good, as such, without an order. *Heslep v. City of San Francisco*, 4 Cal. 2.

2. An order of reference cannot go beyond the pleadings of the parties. *Branger v. Chevalier*, 9 Cal. 353.

3. A reference or arbitration, in which there is no order of Court or agreement filed with the Clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the Court, by which it loses all control over the case, and has no authority to enter judgment upon the finding, except by consent of parties. *Heslep v. City of San Francisco*, 4 Cal. 2.

4. The order of the referee in the proceedings supplementary should state simply that the property described should be applied towards the satisfaction of the judgment, in such manner as the Court should direct. *Adams v. Hackett*, 7 Cal. 202.

5. **Equity suits may be referred without consent.**—The Court may order a reference in equity cases without consent of parties. *Smith v. Rowe*, 4 Cal. 7.

6. **Statute is in aid of the common law.**—Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson v. Wells*, 2 Cal. 122.

7. **Generally.**—The consent of a party to an order of reference must be in writing, or entered on the minutes. *Smith v. Pollock*, 2 Cal. 92.

8. An order of reference cannot be made without the consent of the adverse party. *Benham v. Rowe*, 2 Cal. 261.

9. Where an entry on the minutes recites that "the parties came by their attorneys, and defendant, by his attorney, moved the Court that the cause be referred:" *Held*, that such a reference was made on the appellant's motion, and in one of the modes prescribed by law, "by oral consent, in open Court, entered on the minutes." *Bates v. Visser*, 2 Cal. 355.

10. A stipulation to refer the whole matter, is a waiver of any objection that the motion for a new trial and to set aside the award was not made within the statute time. *Heslep v. City of San Francisco*, 4 Cal. 2.

11. The whole issue in divorce cases cannot, even by stipulation of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts, the Court is obliged to disregard it, and base its decree only upon the legal testimony taken. *Baker v. Baker*, 10 Cal. 527.

### § 183. *Reference ordered on motion, in what cases.*

When the parties do not consent, the Court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1st. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein:

2d. When the taking of an account is necessary for the information of the Court before judgment, or for carrying a judgment or order into effect:

3d. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action; or,

4th. When it is necessary for the information of the Court in a special proceeding.

1. Our statute, as to referring cases, applies solely to equity causes. The right of trial by jury in all common law actions is secured by the Constitution of this State. *Grim v. Norris*, 19 Cal. 140.

2. Action, for balance of an account. Defense, payment by a promissory note. Replication, that the plaintiff was induced to receive the note by means of fraudulent representations: *Held*, that the case was not referable under the statute, without the written consent of both parties. *Seamen v. Mariani*, 1 Cal. 336.

5. The Court may order a reference to ascertain the damages sustained by reason of an injunction issued without a cause. *Russell v. Elliott*, 2 Cal. 245.

A reference may be made to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the Court or Judge shall appoint one or more referees, not exceeding three, to whom there is no legal objection; or the reference may be made to a Court Commissioner of the county in which the action or proceeding is triable. *There shall be no legal objection.*

§ 185. *Either party may object; grounds of objection.*

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity, within the third degree, to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party ; or being a member of the family of either party ; or a partner in business with either party ; or being security on any bond or obligation for either party.

4th. Having served as a juror, or been a witness on any trial between the same parties for the same cause of action.

5th. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in such person evincing enmity against or bias to either party.

1. The fact that the referee, in the proceedings supplementary to execution, was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Adams v. Hackett*, 7 Cal. 187.

§ 186. *Objections, how disposed of.*

**The objections taken to the appointment of any person as referee**

shall be heard and disposed of by the Court. Affidavits may be read, and any person examined as a witness, as to such objections.

§ 187. *Referees to report within ten days—effect of—how ex-*

Sec. 187. The referees or Commissioners shall report their findings in writing to the Court within ten days, or within such further time as may be allowed by the Court after the testimony shall have been closed, and the facts found and conclusions of law shall be separately stated therein. The finding of the referee or Commissioner upon the whole issue shall stand as the finding of the Court; and upon the filing with the Clerk of the Court, judgment may be entered thereon in the same manner as if the action had been tried by the Court. The finding of the referee or Commissioner may be excepted to and reviewed in like manner as if made by the Court. When the reference is to report the facts the finding reported shall have the effect of a special verdict.

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1. **Referees, powers and duties of, trial.**—Referees have no power to allow the parties to alter the pleadings after a case has been submitted to them. *De la Riva v. Berregosa*, 2 Cal. 195.

2. Referees should exclude items barred by the Statute of Limitations, if objected to. *Id.*

3. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marziou v. Pioche*, 10 Cal. 545.

4. The trial of a referee should be conducted in the same manner as before a Court, and the evidence should be embodied in a bill of exceptions, and certified by the referee. *Goodrich v. City of Marysville*, 5 Cal. 430.

5. Hearsay and irrelevant testimony should be excluded by referees. *De la Riva v. Berregosa*, 2 Cal. 195.

6. Where a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. *Monson v. Cooke*, 5 Cal. 436.

7. **Report, how, when and for what, set aside.**—The report of a referee cannot be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial upon exceptions taken at the trial, or the evidence certified. *Goodrich v. City of Marysville*, 5 Cal. 430.

8. If the order of reference fails to direct a return of the evidence to the Court, the party objecting to the report must see that such testimony as he relies on is properly certified. *Id.*

9. Error in the report of a referee must be taken advantage of by written objections to entering judgment on it, or by motion for a new trial. *Porter v. Barling*, 2 Cal. 72.

10. When the alleged error consists in the final conclusion of law or facts drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report, and for a new trial. *Branger v. Chevalier*, 9 Cal. 362.

11. A reference is a substitution for a jury; and a judgment should be had upon their report as upon a verdict, and a motion to set aside the report of referees is necessary before the appellate Court be required to examine the report and set the same aside. *Gunter v. Sanchez*, 1 Cal. 48.

12. Judgment is entered as a matter of course on the report of a referee, and the only mode to take advantage of error is to move to set the judgment aside, as on motion for a new trial. *Sloan v. Smith*, 3 Cal. 407.

13. A report of a referee can only be set aside on account of fraud, gross error of law or fact, apparent on its face. *Headley v. Read*, 2 Cal. 324.

14. Court has power to set aside report of referee, and grant new trial, on the ground that the evidence before the referee did not justify his decision. *Cappe v. Brizolua*, 19 Cal. 607.

15. A Court can interfere and set aside the report of a referee, upon the same ground as it will proceed to set aside the verdict of a jury. *McHenry v. Moore*, 5 Cal. 92.

16. The report of a referee upon conflicting evidence must be treated in the light of a verdict of a jury, and will not be disturbed in this Court upon an appeal from an order refusing to grant a new trial in the Court below. *Ritchie v. Bradshaw*, 5 Cal. 229.

17. Though a plea would be bad upon demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defeat of the plea is not sufficient reason to set aside the report. *Ritchie v. Davis*, 5 Cal. 453.

18. If there be no exception taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the Court cannot disturb the report, and an order granting a new trial in such case will be reversed. *Tyson v. Wells*, 2 Cal. 130; *Grayson v. Guild*, 4 Id. 125.

19. When a case is referred to a referee, under the statute, to hear and determine the issues of fact and of law, and report the same to the Court, and he makes his report, wherein no errors of law or fact occur, and no exceptions are taken, the Court below should not set aside the report and grant a new trial. *Grayson v. Guild*, 4 Cal. 125.

20. It would be a gross abuse of discretion for a Court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the Judge. *Goodrich v. City of Marysville*, 5 Cal. 430.

21. It is error for the Court to set aside the report of a referee, upon an examination of testimony which was not properly before it. *Id.*

22. **Report should state facts found, etc.**—The report of a referee, like the finding of a Court, should state the facts found and the conclusions of law. Without this, the parties would be remediless, and their rights concluded, in many cases, by the arbitrary decision of a referee. *Lambert v. Smith*, 3 Cal. 409.

23. **Cannot file an amended report.**—A referee has no right to bring in and file an amended report, and the case must be reviewed with reference to the original report. *Headley v. Reed*, 2 Cal. 324.

24. **Referee need not be sworn.**—The statute does not require the referee to be sworn; consequently, the imposition of an oath by the Court would be of no effect other than to put it in their power to commit moral perjury, without being amenable to the law. *Sloan v. Smith*, 3 Cal. 407.

25. If the report of a referee is not made immediately after the close of the testimony, it is deemed excepted to. *Headley v. Reed*, 2 Cal. 324.

26. **Exception to report.**—Trials before a referee are conducted in the same manner as before Courts, and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a Court; and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. *Phelps v. Peabody*, 7 Cal. 50.

27. When the referee excludes proper or admits improper evidence, or does any act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Branger v. Chevalier*, 9 Cal. 353.

28. In suits in equity, where accounts are taken by the referee, exceptions to his report must be as specific as was required in the old chancery practice in stating an account before a master, and the old chancery practice is still in force in respect to all such cases. (22 Barb. 320.) *Lawrence v. Fowler*, 20 How. Pr. 407.

29. **Variance between pleadings and proof.**—Where there is a variance between the pleading and the proofs, on a trial before a referee, instead of dismissing the complaint, he should, if the evidence is sufficient, give his decision, leaving it to the discretion of the Court to amend the pleadings in support thereof. *Hart v. Hudson*, 6 Duer, 294.

30. **May open report for further evidence.**—The delay of referees in making their report cannot be deemed the delay of the Court. They are presumed not to have concluded their deliberations until their report is signed; for meanwhile they may open it for further evidence. *Kissam v. Hamilton*, 20 How. Pr. 369.

31. **Motion to set aside.**—The time within which a notice of a motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, is regulated by section one hundred and ninety-five.

32. Failure to appear and prosecute a motion to set aside the report of a referee and for new trial, is an abandonment of motion, and the order made denying the motion for such failure to appear, is not the subject of review on appeal. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Id. 303; *Green v. Doane*, 15 Id. 304.

33. **Report, effects of.**—The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the Court. *Goodrich v. City of Marysville*, 5 Cal. 430.

34. The report of a referee, under the statute, has the same legal effect as the award of an arbitrator. *Headley v. Reed*, 2 Cal. 322.

35. Finding of a referee conclusive as to the facts, on conflicting evidence. *Knowles v. Joost*, 13 Cal. 620.

36. The decision of referees upon a question of fact will be regarded, on appeal, as conclusive as the verdict of a jury, and will not be interfered with. *Gunter v. Sanchez*, 1 Cal. 45; *Walton v. Minturn*, Id. 362.

37. The report of a referee is the same as an award of an arbitrator. *Grayson v. Guild*, 4 Cal. 125.

38. If a report of a referee, under the statute, contain sufficient on which to base a judgment, it is the duty of the Court below to enter judgment in accordance with the report, so far as it concerns the matter referred, and it has no right to entertain any objection whatever. *Headley v. Reed*, 2 Cal. 322.

39. The report of referees is a verdict, within the spirit of the statute regulating entry of judgment after the death of a party, on verdicts. (3 Sandf. 660; 10 Wend. 601; 8 How. Pr. 244.) But a report signed and delivered after the death, cannot be given effect by relation back. *Kissam v. Hamilton*, 20 How. Pr. 369; 12 Abb. Pr. 548.

40. If, on a trial, whether by the Court or by a referee, a decision or report is made in favor of one party, and a reference is ordered to take an accounting, which is necessary in order to ascertain the amount for which judgment is to be rendered, judgment cannot be entered until the accounting has been had, and everything essential to the judgment has been ascertained. *McMahon v. Allen*, 7 Abb. Pr. 1.

41. **Mandamus.**—A *mandamus* lies to compel the Judge of a District Court to enter judgment on the report of a referee. *Russell v. Elliott*, 2 Cal. 246.

42. **Appeal.**—The Supreme Court will not review a judgment entered on the report of a referee, if no objection was made to the report in the Court below. *Porter v. Barling*, 2 Cal. 72.

43. When a report of a referee has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the Supreme Court will correct both errors at the same time in a chancery case. *Grayson v. Guild*, 4 Cal. 125.

44. An order setting aside a report of a referee, appointed to take an account, is merely interlocutory, and not the subject of appeal before judgment. *Johnson v. Hopkins*, 6 Cal. 83.

45. An order setting aside the finding of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character, and not the subject of appeal. *Baker v. Baker*, 10 Cal. 528.

46. It seems that a stay of proceedings, granted on an appeal from an order of reference, is proper. *Smith v. Pollock*, 2 Cal. 94.



CHAPTER VII.—*General provisions relating to trials.\**

## ARTICLE I.

## EXCEPTIONS.

SEC. 188. *An exception, what is ; what exception may be disregarded.*

189. *The point of exception shall be particularly stated, etc.*

190. *No particular form required.*

~~191. *When deemed excepted to*~~

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"SEC. 4. During the progress of a cause, a party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the Judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding Judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and a party, against whom judgment is rendered, may appeal from such judgment without any further statement or motion; and on such appeal, it shall only be necessary to bring to the Supreme Court the transcript of the pleadings, and the judgment, and the bill or bills of exception so taken."

6. Objections to the introduction of evidence must be taken on the trial below; they cannot be taken for the first time in the appellate Court. *Covillaud v. Turner*, 7 Cal. 38.

7. A party cannot, by consenting to admit evidence, "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and, after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Id.*

8. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then after verdict except to the action of the Court upon motion for new trial. *Sutter v. Putney*, 7 Cal. 423.

9. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *McCartney v. Fitz Henry*, 16 Cal. 186.

§ 189. *The point of exception shall be particularly stated, etc.*

The point of the exception shall be particularly stated, and may be delivered in writing to the Judge, or if the party require it, shall be written down by the Clerk; when delivered in writing, or written down by the Clerk, it shall be made conformable to the truth, or be at the time corrected, until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the Judge's minutes, and afterwards settled in a statement of the case, as provided in this act.

1. **Exceptions to be written down by the Clerk.**—Where the parties have not made a case nor a bill of exceptions, but have relied upon the testimony taken down by the Clerk, pursuant to section two hundred and seventy-one of the Practice Act of 1850, no question can be raised, on appeal, respecting the decisions of the Court below during the progress of the trial. The case of *Gunter v. Geary*, (*ante*, 462) affirmed in this respect. *Price v. Minturn*, 1 Cal. 470.

2. If a party desires to bring the rulings of the District Judge, during the progress of the trial, under review, he must either make out a statement of facts, pursuant to section two hundred and seventy-two of the Practice Act of 1850, or a bill of exceptions, pursuant to sections two hundred and eighty-seven and two hundred and eighty-eight. This Court will not examine into the correctness of the decisions of the District Judge, where it has been left to the Clerk of the District Court to ascertain and settle what such decisions were. *Gunter v. Geary*, 1 Cal. 462.

3. A mere transcript of the evidence taken down by the Clerk is no part of the record, unless made so by bill of exceptions. *Wilson v. Middleton*, 2 Cal. 54.

4. Where, under the two hundred and seventy-first section of the Act to Regulate Proceedings in Civil Cases, the evidence is taken down by the Clerk in the Court below, on motion of a party, a transcript of it certified by him is a substitute for a bill of exceptions or statement of facts, in the absence of such bill or statement. Decisions contravening the plain letter of the statute are not binding as authority. *Ingraham v. Gildermester*, 2 Cal. 161.

§ 190. *No particular form required.*

No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more; and the whole as briefly as possible.

CHAPTER VII.—*General provisions relating to trials.\**

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1. A statement and bill of exceptions in the statute, on the subject of appeal, mean the same thing. *People v. Lee*, 14 Cal. 510.

2. The sole object of a bill of exceptions is to make a record of the special action of the Court of what is not record by the general law. But that which is of record already, cannot receive any higher degree of sanction by being made record a second time. *Parsons v. Davis*, 3 Cal. 425.

3. **Exceptions must be taken during the trial.**—Exceptions must be taken to the rulings of the referee during the trial and certified by him. *Tyson v. Wells*, 2 Cal. 122.

4. There is nothing in the statute which requires that exception to depositions shall be filed before the time of trial. The objection can be made at any time before they are read in evidence. *Dye v. Bailey*, 2 Cal. 384.

5. Objections to the form of a deed must be made on the trial at *nisi prius*. *Porter v. Rasette*, 5 Cal. 468.

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6. Objections to the introduction of evidence must be taken on the trial below ; they cannot be taken for the first time in the appellate Court. *Covillaud v. Turner*, 7 Cal. 38.

7. A party cannot, by consenting to admit evidence, "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and, after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Id.*

8. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then after verdict except to the action of the Court upon motion for new trial. *Sutter v. Putney*, 7 Cal. 423.

9. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *McCartney v. Fitz Henry*, 16 Cal. 186.

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*Amendment to Sec. 189.—Passed April 20th, 1863.*

[Takes effect sixty days after passage.]

§ 189. The point of the exception shall be particularly stated, and may be delivered in writing to the Judge ; or, if the party require, it shall be written down by the Clerk. When delivered in writing, or written down by the Clerk, it shall be made conformable to the truth, or be at the time corrected, until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the Judge's minutes, and afterwards settled in a statement of the case, as provided in this Act: *provided*, that if the Judge shall, in any case, refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the Supreme Court for leave to prove the same, and shall have the right so to do, in such mode and manner and according to such regulations as the Supreme Court may, by rules, impose.

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4. There is nothing in the statute which requires that exception to depositions shall be filed before the time of trial. The objection can be made at any time before they are read in evidence. *Dye v. Bailey*, 2 Cal. 384.

5. Objections to the form of a deed must be made on the trial *at nisi prius*. *Porter v. Rassette*, 5 Cal. 468.

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"SEC. 4. During the progress of a cause, a party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the Judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding Judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and a party, against whom judgment is rendered, may appeal from such judgment without any further statement or motion; and on such appeal, it shall only be necessary to bring to the Supreme Court the transcript of the pleadings, and the judgment, and the bill or bills of exception so taken."

6. Objections to the introduction of evidence must be taken on the trial below ; they cannot be taken for the first time in the appellate Court. *Covillaud v. Turner*, 7 Cal. 38.

7. A party cannot, by consenting to admit evidence, "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and, after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Id.*

8. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then after verdict except to the action of the Court upon motion for new trial. *Sutter v. Putney*, 7 Cal. 423.

9. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *McCartney v. Fitz Henry*, 16 Cal. 186.

§ 189. *The point of exception shall be particularly stated, etc.*

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*Amendment to Sec. 189.—Passed April 20th, 1863.*

[Taken effect sixty days after passage.]

§ 189. The point of the exception shall be particularly stated, and may be delivered in writing to the Judge ; or, if the party require, it shall be written down by the Clerk. When delivered in writing, or written down by the Clerk, it shall be made conformable to the truth, or be at the time corrected, until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the Judge's minutes, and afterwards settled in a statement of the case, as provided in this Act: *provided*, that if the Judge shall, in any case, refuse to allow an exception in accordance with the facts, any party aggrieved thereby may petition the Supreme Court for leave to prove the same, and shall have the right so to do, in such mode and manner and according to such regulations as the Supreme Court may, by rules, impose.

§ 190. *No particular form required.*

No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more ; and the whole as briefly as possible.



CHAPTER VII.—*General provisions relating to trials.\**

## ARTICLE I.

## EXCEPTIONS.

SEC. 188. *An exception, what is ; what exception may be disregarded.*

189. *The point of exception shall be particularly stated, etc.*

190. *No particular form required.*

191. *When deemed excepted to.*

§ 188. *An exception, what is ; what exceptions may be disregarded.*

An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, Court or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

1. A statement and bill of exceptions in the statute, on the subject of appeal, mean the same thing. *People v. Lee*, 14 Cal. 510.

2. The sole object of a bill of exceptions is to make a record of the special action of the Court of what is not record by the general law. But that which is of record already, cannot receive any higher degree of sanction by being made record a second time. *Parsons v. Davis*, 3 Cal. 425.

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1. **Exceptions to be written down by the Clerk.**—Where the parties have not made a case nor a bill of exceptions, but have relied upon the testimony taken down by the Clerk, pursuant to section two hundred and seventy-one of the Practice Act of 1850, no question can be raised, on appeal, respecting the decisions of the Court below during the progress of the trial. The case of *Gunter v. Geary*, (*ante*, 462) affirmed in this respect. *Price v. Minturn*, 1 Cal. 470.

2. If a party desires to bring the rulings of the District Judge, during the progress of the trial, under review, he must either make out a statement of facts, pursuant to section two hundred and seventy-two of the Practice Act of 1850, or a bill of exceptions, pursuant to sections two hundred and eighty-seven and two hundred and eighty-eight. This Court will not examine into the correctness of the decisions of the District Judge, where it has been left to the Clerk of the District Court to ascertain and settle what such decisions were. *Gunter v. Geary*, 1 Cal. 462.

3. A mere transcript of the evidence taken down by the Clerk is no part of the record, unless made so by bill of exceptions. *Wilson v. Middleton*, 2 Cal. 54.

4. Where, under the two hundred and seventy-first section of the Act to Regulate Proceedings in Civil Cases, the evidence is taken down by the Clerk in the Court below, on motion of a party, a transcript of it certified by him is a substitute for a bill of exceptions or statement of facts, in the absence of such bill or statement. Decisions contravening the plain letter of the statute are not binding as authority. *Ingraham v. Gildermester*, 2 Cal. 161.

§ 190. *No particular form required.*

No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter as is necessary to explain it, but no more; and the whole as briefly as possible.

1. **Exception, sufficiency of.**—A general objection to the admissibility of evidence is insufficient. *People v. Apple*, 7 Cal. 290; *Kiler v. Kimball*, 12 Id. 268; *Martin v. Traverse*, 12 Id. 245.

2. Where the objection to impeaching evidence was general, and the Court excluded the testimony without assigning any reason, the Supreme Court will presume in favor of the correctness of the action of the Court below; and the appellant must show error to his prejudice, by putting his exceptions in the proper shape. *Baker v. Joseph*, 16 Cal. 177.

3. Where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony was, not that possibly it might have been, relevant. *Cohn v. Mulford*, 15 Cal. 50.

4. An exception, showing that the Court ruled out the proffered statements of the vendor of personal property, subsequent to his sale, without showing what the statements were, is insufficient. The exception must show the statements to have some pertinency to the matters in issue. *Id.*

5. Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise this Court cannot review it. *Martin v. Traverse*, 12 Cal. 243.

6. Where an exception is taken to the decision of a Court refusing a nonsuit, it devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decision complained of is inserted in the bill of exceptions.—Per Bennett, J. *Ringgold v. Haven*, 1 Cal. 108.

7. An exception, in general terms, to the whole of a charge, which embraces more than one point, is insufficient. *Robinson v. N. Y. & Erie R. R. Co.*, 27 Barb. 512; *The East River Bank v. Gedney*, 4 E. D. Smith's C. P. R. 582; *Carland v. Day*, 4 Id. 251.

8. Where the charge or ruling consists of a single proposition, an exception to it generally is sufficiently specific. *Requa v. Holmes*, 16 N. Y. (2 E. P. Smith's) R. 193, 201.

9. But an exception to a ruling admitting the reading of certain proceedings as evidence is not sufficient, if founded on an objection which did not specify the ground of the objection, and the evidence was such that any part of it, if offered separately, would have been competent. *Id.*

10. Where an interrogatory contains several questions, an objection that it is answered only in part is too general. The questions which are not answered must be pointed out. *Walton v. The National Fund Life Assurance Co.*, 20 N. Y. (6 Smith) 32.

11. An exception in these words: "To that part of said decision which allows \$3,342 as interest," is a general exception to the allowance of interest at all; and no objection can be taken under it to the time for which interest is allowed. *McMahon v. N. Y. & Erie R. R. Co.*, 20 N. Y. (6 Smith) 463.

12. To the charge of the Court on the trial, assuming to decide a question of fact, the defendant excepted, on the single ground that the evidence did not warrant the conclusion: *Held*, on appeal, that the objection which might have been taken to the decision of a question of fact by the Court, was waived. (8 M. & W. 421; 2 Kern. 18); *Cary v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35, 41.

13. Where no ground for an exception is stated, it is always disregarded. *Walton v. The National Fund Life Assurance Co.*, 20 N. Y. (6 Smith) 32.

14. When any allowance is appealed from as excessive, the excess, if it be of a definite amount, should be pointed out by the exceptions, so that the respondent may remit it, if he so elect. *McMahon v. N. Y. & Erie R. R. Co.*, (6 Smith) 463.

15. If there is but a single exception to a refusal to charge as requested, it can only be sustained by showing that every proposition requested is tenable. (1 Seld. 422; 2 Id. 233); *Mages v. Badger*, 30 Barb. 246.

16. No exception lies to a refusal to permit a demurrer to evidence. *Colegrove v. New Haven & Harlem R. R. Co.*, 20 N. Y. (6 Smith) 492.

17. On the trial, defendant's counsel excepted to the refusal of the Court to restrain the remarks of plaintiff's counsel before the jury to the matters at issue and in evidence; but it did not appear that plaintiff's counsel subsequently made any remarks which he should not have been permitted to make; and in the charge the Court instructed the jury to lay out of view that which had previously been said: *Held*, that the exception would not avail as ground of new trial. Defendant

should show that improper remarks were made after his exception. *Fry v. Bennett*, 3 Bosw. 200, 242.

18. **What bill of exception should and should not embody.**—It is not necessary to embody matter of record in a bill of exceptions. *Johnson v. Sepulveda*, 5 Cal. 151.

19. Documents and affidavits, to be reviewed by the appellate Court, must be embodied in a bill of exceptions or record. *Gates v. Buckingham*, 4 Cal. 286.

20. Affidavits as to the incompetency of a juror must be embodied in a bill of exceptions, to be reviewed by the appellate Court. *People v. Stonecipher*, 6 Cal. 411.

21. Where the Court below charged the jury, among other things, that if they found for plaintiff, he was entitled to recover the value of the use and occupation from October, 1853—a period long anterior to the commencement of the action, the complaint not containing any averment as to the time when plaintiff's title accrued or existed, etc.—and the defendant excepted generally to all the charge, and followed this general exception up by a specification of certain portions of the charge to which his exception was particularly directed: *Held*, that this general exception did not cover the charge as to damages. *Payne v. Treadwell*, 16 Cal. 248.

22. A trial before a referee should be conducted in the same manner as before a Court, and the evidence should be embodied in a bill of exceptions and certified by the referee. *Goodrich v. City of Marysville*, 5 Cal. 431; *Phelps v. Peabody*, 7 Id. 52.

23. When the referee excludes proper testimony, or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Branger v. Chevalier*, 9 Cal. 362.

24. **Mode of reserving question of law.**—Where the Court below tries the cause without a jury, the proper mode of reserving questions of law is to ask the Court to decide them, and note the refusal in a bill of exceptions. *Griswold v. Sharp*, 2 Cal. 17.

25. Where plaintiffs, having excepted to the ruling of the Court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence confined on appeal to the grounds taken below. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 549.

### § 191. When deemed excepted to.

When a cause has been tried by the Court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to on motion for a new trial or on appeal, without any special notice that an exception is taken thereto.

1. A report which is not made immediately after the close of the testimony, by the one hundred and ninety-first section of the Practice Act, is deemed as excepted to. *Headley v. Reed*, 2 Cal. 322.

## ARTICLE II.

## NEW TRIALS.

SEC. 192. *New trial defined.*

193. *When new trial may be granted.*

194. *When application for new trial to be made upon affidavit or statement.*

195. *Notice of motion for new trial; when and how statements or affidavits to be made and filed.*

196. *Motion to be made without delay.*

§ 192. *New trial defined.*

A new trial is a reëxamination of an issue of fact in the same Court, after a trial and decision by a jury, Court or referees.

§ 193. *When a new trial may be granted.*

[1862.] The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of said party :

1st. Irregularity in the proceedings of the Court, jury, or adverse party, or any order of the Court, or abuse of discretion, by which either party was prevented from having a fair trial.

2d. *Misconduct of the jury, and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict, or to a finding on any question or questions submitted to them by the Court, by a resort to the determination of chance; such misconduct may be proved by the affidavits of any one or more of the jurors.*

3d. Accident or surprise, which ordinary prudence could not have guarded against.

4th. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5th. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6th. Insufficiency of the evidence to justify the verdict, or other decision, or that it is against law.

7th. Error in law, occurring at the trial, and excepted to by the party making the application.

N. Y. Code, § 264.

1. **New trial will be granted when justice requires.**—Where from the record it appears highly probable that the judgment of the Court below is founded neither upon law or equity, the Supreme Court should reverse the judgment or grant a new trial. *Reed v. Jourdain*, 1 Cal. 102.

2. It is error to refuse a new trial when justice requires that it should be granted. *Ross v. Austill*, 2 Cal. 183.

3. Injury is presumed from evidence erroneously admitted; and the adverse party must show clearly that no injury accrued, or the judgment cannot stand. *Grimes v. Fall*, 15 Cal. 63.

4. **Former verdict or decision will not be disturbed for immaterial errors.**—It is useless to put parties to the additional trouble and expense of a new trial, when we see clearly that after, perhaps, a protracted litigation, the result must be the same. *Tohler v. Folsom*, 1 Cal. 213; *Smith v. Compton*, 6 Id. 26.

5. A new trial will not be granted where the evidence shows that a case cannot be made out, and it would consequently be a useless expense. *Suñol v. Hepburn*, 1 Cal. 285.

6. To entitle an objection to notice, it must not only be on a material matter, affecting the substantial rights of the parties, but its point must be particularly stated. The party must lay his finger on the point of his objection. *Kiler v. Kimball*, 10 Cal. 267.

7. Where it is apparent, from the whole case, that the plaintiff can, in no event, recover anything but nominal damages, the Court will not grant him a new trial, although an error has been committed in the charge. *Hopkins v. Grinnell*, 28 Barb. 533.

8. The Court will disregard error in the admission of evidence against objections, where it is plain that it could not have prejudiced the case with the referee, and that, if it had not been received, his conclusions must necessarily have been the same. *Belmont v. Coleman*, 1 Bosw. 188.

9. **Application must be made by the party aggrieved.**—A new trial will not be granted for an error by which the rights of the party were not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148.

10. Where the instructions of the Court, though incorrect in law, are all in favor of the defendant, he cannot complain of the error. *Gaven v. Dopman*, 5 Cal. 342.

11. An error in an instruction which does not militate against the appellant, or a mere want of perspicuity on the part of the Court below in framing instructions, is not a ground of reversal. *People v. Moore*, 8 Cal. 94.

12. A party cannot move to set aside a verdict in his own favor, on the ground that the evidence was insufficient to sustain it. *Moore v. Wood*, 19 How. Pr. 405.

13. **Errors occurring at the trial must be specially excepted to at the time.**—When there has been no objection raised or exception taken to the insufficiency of the evidence, this Court would presume that sufficient evidence of a proper character was given to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

14. Courts will require an objection to the sufficiency of evidence to be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. *Goodale v. West*, 5 Cal. 341.

15. An objection to a form of a verdict should be made on motion for a new trial. It is too late to raise it in this Court for the first time. *Douglass v. Kraft*, 9 Cal. 562.

16. Where a defendant's objection to the admission of testimony on the trial is



general, he cannot be permitted to make it *special* for the first time in this Court. *People v. Glenn*, 10 Cal. 32.

17. Where the objection to the introduction of testimony was in general terms that it was irrelevant, the objection will not be considered in the Supreme Court, if the testimony could, under any possible circumstances, have been relevant. *Dreux v. Domec*, 18 Cal. 83.

18. Where an objection is taken to the admission of evidence, without a specification of the grounds of the objection, it does not merit consideration. *Kiler v. Kimball*, 10 Cal. 267.

19. Where instructions to the jury are not excepted to at the time they are given, or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

20. A refusal to give an instruction cannot be urged as error for the first time, on a petition for a rehearing on appeal. *Payne v. Treadwell*, 16 Cal. 247.

21. A party cannot take his chances for a verdict on instructions given and refused, without exceptions taken, and then, after verdict, except to the action of the Court upon motion for a new trial. *Letter v. Putney*, 7 Cal. 423.

22. On motion for new trial the Court cannot reverse a former judgment.—On motion for new trial, it is irregular for the Court to reverse its first judgment, and render a contrary one, without hearing or notice. *Mitchell v. Hackett*, 14 Cal. 661.

23. A new trial awarded on the ground that the case had not been fully considered in certain important aspects. *Mills v. Van Voorhies*, 10 Abb. Pr. R. 152.

24. Granting or refusing motion for new trial discretionary. Motion for new trial is addressed to the sound discretion of the Court, and the Supreme Court can interfere only in cases of plain abuse of such discretion. *Peters v. Foss*, 16 Cal. 357; *Drake v. Palmer*, 2 Id. 181; *Watson v. McClay*, 4 Id. 588; *Hastings v. Steamer Uncle Sam*, 10 Id. 341; *Burnett v. Whitesides*, 15 Id. 36.

25. Where the evidence is conflicting, the granting or refusing a new trial rests in the discretion of the Court below, and this Court will not interfere, whether the new trial be granted or refused. *Weddle v. Stark*, 10 Cal. 301.

26. Where, on trial of an ejectment suit, certain evidence offered by defendant was rejected, on the ground that the averment in the answer that the original location of the lot in dispute was according to "the actual plan, then used and recognized, of the town of San Francisco or Yerba Buena," meant the map of the survey, and not the actual survey or plan on the ground, and the Court refused the defendant permission then to amend his answer in this respect, but subsequently granted him a new trial for that purpose: *Held*, that the Court below had the power to grant the new trial of this cause; and that this Court will not interfere. *Lestrade v. Barth*, 17 Cal. 285.

27. The Court below may refuse a new trial, even though both parties consent to it. Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. *Phelan v. Ruiz*, 15 Cal. 90.

28. Where, in a chancery cause, certain issues of fact are submitted to and determined by a jury, the granting of a new trial is entirely discretionary with the Chancellor, and his action is not revisable. *Gray v. Eaton*, 5 Cal. 448.

29. Where the motion for new trial, though made, does not appear to have been acted on, the appellate Court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 542.

30. New trial in equity cases.—The Practice Act applies as well to legal as equitable actions, so far as its provisions are consistent with the rights and remedies administered in Courts of Equity. And the only way in which the verdict of a jury on issues submitted can be reviewed, is by motion for new trial—except, probably, that the Court, whether sitting in equity or on the trial of a common law action, may, of its own motion, set aside the verdict of a jury when clearly and palpably against the evidence. *Duff v. Fisher*, 15 Cal. 375.

31. There is no substantial difference between a rehearing in an equity case, which opens the decree and places the case before the Court for trial anew, and a new trial in a case at law, tried and decided by the Court. *Riddle v. Baker*, 13 Cal. 295.

32. A refusal to grant a new trial is no ground of error, particularly in an equity case, where there may have been no necessity for a new trial; as upon application to the Court upon the pleadings and facts before it the proper decree might have been rendered, notwithstanding the verdict; or, if refused, the error corrected by appeal. *Phelan v. Ruiz*, 15 Cal. 90.

33. **New trial in cases tried by a referee.**—The provisions of the Practice Act relating to new trials are general, and vest in Courts the same power, in cases tried by a referee, as in cases tried by the Court itself, or by a jury. *Cappe v. Brizzolara*, 19 Cal. 607.

34. A Court has power to set aside the report of a referee, and grant a new trial, on the ground that the evidence before the referee was insufficient to justify his decision. *Id.*

35. After the rendition of judgment upon a report of referee, the Court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the award of an arbitrator, and for no other. *Headley v. Reed*, 2 Cal. 322.

36. Errors in the report of a referee must be taken advantage of by written objections to entering judgment on it, or by a motion for a new trial. *Porter v. Barling*, 2 Cal. 72.

37. The Court will not disturb the award of an arbitrator or report of a referee, unless the error complained of, whether of law or fact, appear on the face of the award or report. *Tyson v. Wells*, 2 Cal. 122.

38. If there be no exceptions embodied in the report, showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions be not disclosed, the Court cannot disturb the report; and an order granting a new trial in such case will be reversed. *Id.*

39. A report of a referee, like the verdict of a jury, is, as a general rule, conclusive in a case of conflict of evidence. (1 E. D. Smith, 85; 3 Id. 98; 4 Id. 365; 3 Cow. 168.) It is, therefore, like such verdict, only to be set aside when the finding is clearly against the weight of evidence, or where, upon the trial, some rule of evidence or principle of law has been violated. (1 E. D. Smith, 85; 5 Duer, 216); *Hoagland v. Wright*, 20 How. Pr. 70.

40. **County Court may grant new trial.**—The appellate power of the Supreme Court over the County Court could not be properly or efficiently exercised, unless the power to grant a new trial existed in the County Court. The County Court certainly has power to grant a new trial. *Dickenson v. Van Horn*, 9 Cal. 211.

41. **Equity will not interfere, if new trial is refused.**—Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity and enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 226.

42. **Effect of stipulation that motion for new trial be denied.**—Where the parties in the Court below stipulated that a motion for a new trial should be denied, they cannot question in this Court the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

43. **First subdivision.**—A new trial will be ordered where there is such irregularity in the proceedings that the ends of justice will be better subserved. *Sannickson v. Brown*, 5 Cal. 58.

44. Where a judgment is rendered at nine A. M. upon a summons citing defendant to answer at 10 A. M.: *Held*, that the judgment is irregular, and a new trial will be ordered. *Parker v. Shephard*, 1 Cal. 132.

45. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, when no objection to him was made until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of the plaintiff. *Lawrence v. Collier*, 1 Cal. 37.

46. As to new trial because of an incompetent juror. *Thompson v. Paige*, 16 Cal. 77.

47. Where a jury are instructed to bring in a sealed verdict, and they retire, and, after agreeing upon the verdict, seal it up and give it to the officer in charge

of them—the Clerk being absent—and request him to give it to the Clerk, which is done; and after the meeting of the Court the following morning, the verdict is opened, in the presence of the jury, and read by the Clerk without exception: *Held*, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the Court itself as if it had been directly delivered to the Clerk. *Faige v. O'Neal*, 12 Cal. 483.

48. Under any circumstances, the withdrawal of a juror and the continuance of a case thereby is no ground for reversing a judgment subsequently obtained. *Benedict v. Cozzens*, 4 Cal. 382.

49. After a jury have once retired, it is error to allow them to come into Court and receive instructions in the absence of the parties or their counsel. *Redman v. Gulnac*, 5 Cal. 148.

50. Unless the irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Thrall v. Smiley*, 9 Cal. 538.

51. Where the facts show that the action of the Court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed, unless there has been a motion for a new trial. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

52. Questions of discretion of the Judge below cannot be reviewed in the Supreme Court, except in cases of gross abuse to the injury of the party. *Smith v. Billett*, 15 Cal. 26.

53. Lower Courts have an enlarged discretion in the conduct of the business before them; and with this discretion the appellate Court will not interfere, unless it affirmatively appear that injustice has been done. *Broadus v. Nelson*, 16 Cal. 80.

54. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court, on the trial, permitted the other defendant to file a separate plea of the statute: *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to revise it. *Robinson v. Smith*, 14 Cal. 254.

55. The allowance of an amendment to pleadings is a matter of discretion, for the abuse of which only can the appellate Court interfere. *Gillan v. Hutchinson*, 16 Cal. 156.

56. The allowance to file an answer after demurrer overruled vests in the discretion of the Court below, subject to review, of course, in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

57. The discretion of the Probate Court in certifying an issue of fact joined therein for trial to the District Court, is subject to review by the Supreme Court; and, in case of gross abuse, would be corrected. *Keller v. Franklin*, 4 Cal. 434.

58. In a chancery case, it is doubtful whether a refusal to give instructions to the jury, even conceding them to be correct, can be assigned as error. *Branger v. Chevalier*, 9 Cal. 360.

59. The limits to be set to the scope of remarks of counsel to the jury are in the discretion of the Judge who presides at the trial; and a verdict will not be disturbed by the general term, upon exception to his refusal to stop counsel in a questionable line of remark, unless it clearly appears that the adverse party was actually and unjustly prejudiced before the jury by such remarks. *Fry v. Bennett*, 9 Abb. Pr. R. 45.

60. A judgment entered when no answer is put in, giving the plaintiff relief which was not specifically asked by the complaint—*e. g.*, a judgment in foreclosure for deficiency, where the complaint merely asked for a sale—should be vacated on motion. *Simonson v. Blake*, 12 Abb. Pr. R. 331.

61. The verdict of a jury will not be set aside simply because the Constable in charge has sought to interfere with their deliberations, and urged them to give the verdict which they finally rendered. (2 How. Pr. 23;) *Baker v. Simmons*, 29 Barb. 198.

62. A party who means to avail himself of an irregularity in the progress of a cause, must make his objection in due season, and before the other side has compromised itself by his silence; and a person upon whom the law has cast an interest in an estate, which is the subject of a suit in the Courts for a sale and partition, must abstain from becoming an actor in the proceedings, if he designs at some future time to assert his title upon the ground that he was not made a party, and therefore not included by the judgment or decree. *Regna v. Holmes*, 19 How. Pr. 430.

63. **Second subdivision.**—Where the jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of these sums by the number of persons composing the jury, which result should be their verdict, a verdict thus formed is irregular, and will be set aside. *Wilson v. Berryman*, 5 Cal. 44.

64. But if such means be adopted merely to arrive at a proper result, for the purpose of determining what the verdict shall be, without any being bound thereby, and afterward the jury agree upon such sum as their verdict, the Court will not disturb it. *Id.*

65. Such verdicts are regarded in the same light as gambling verdicts. *Id.*

66. The remark of a juror, during a recess of the trial, that there was no use in taking up time in trying to humbug the jury, and that the lawyer who made the shortest speech would win the case, was not such misconduct as will vitiate the verdict. *Taylor v. California Stage Co.*, 6 Cal. 228.

67. Where a slip from a newspaper was handed by a Deputy Sheriff to the jury, during the progress of the trial, containing matters relating to the trial, but not in evidence, and was perused by them, and the Court subsequently, upon discovery of the fact, instructed the jury that the slip was not in evidence, and that it should be wholly disregarded by them, and it appeared that the perusal could not, from the character of the matter contained in the slip, have prejudiced the losing party: *Held*, not to be a ground for a new trial. *Thrall v. Smiley*, 9 Cal. 529.

68. Although a verdict will not generally be set aside merely because the jury have been approached, if it clearly appear that no injustice has been done, and the interference did not affect the result, yet if it appears that they have been approached in such a manner as might have influenced their verdict, it should be set aside without reference to the source or the motive of the interference. *Nesmith v. The Clinton Fire Ins. Co.*, 8 Abb. Pr. R. 141.

69. During the trial of an action turning upon much conflicting testimony, a juror listened to the statements of a third party, attacking the credibility of the defendant's witnesses: *Held*, that a verdict for the plaintiff must be set aside. *Id.*

70. Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, a ground for a new trial. (1 Cow. 221; 3 Id. 355, 26, 28; 5 Id. 283; 2 Wend. 52; 3 Johns. 252; 7 Id. 32; 4 Barn. & A. 430;) *Anthony v. Smith*, 4 Bosw. 503.

71. **Third subdivision.**—Surprise is not of itself ground for a new trial or a reduction of damages. To authorize a new trial or reduction of damages, the surprise alleged must be such that ordinary prudence could not have guarded against it, and the proceeding which creates it must have prevented the presentation of the case upon its merits. With the allegation of surprise, the party must show that he has been injured by it. *Patterson v. Ely*, 19 Cal. 28.

72. Mere surprise at the evidence given by the witnesses of the defendant is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.

73. A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake; and further, that it was injurious to the party, and that he had no means or had used due diligence to counteract the mistake or to correct it. *Howe v. Briggs*, 17 Cal. 385.

74. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks v. Lyon*, 3 Cal. 113.

75. Surprise at the ruling of the Court on the trial, as to the admission of testimony, is not ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 523.

76. Where plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the Court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise, arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan v. Delaney*, 16 Cal. 85.

77. Where a motion for a new trial is made on the ground that the party was taken by surprise at the trial by the nonattendance of witnesses, it should appear that the party had used reasonable diligence in endeavoring to procure the attendance of his witnesses at the first trial. *Rogers v. Huie*, 1 Cal. 429.

78. Surprise at the testimony of a witness called by the adverse party, is no

ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor v. California Stage Co.*, 6 Cal. 228.

79. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the Court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: *Held*, that this Court will not revise the discretion of the Court below in granting a new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith v. Richmond*, 15 Cal. 501.

80. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance, and if he fail to do this, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

81. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not, with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams v. Price*, 11 Cal. 213.

82. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

83. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham v. McFarland*, 5 Cal. 137.

84. In order to move for a new trial upon the ground of surprise, it must be shown not only a surprise, but one that ordinary prudence could not guard against; and to show that he has been injured by it; to show that upon a new hearing he can make out such a title as would probably be not only a legal but an equitable defense of the action. And he must also show what the title is. *Patterson v. Ely*, 19 Cal. 28.

85. If a mistake of law by a party can ever be made the means of obtaining a new trial on the ground of surprise, it certainly cannot when it was caused by the negligence of such party. *People v. O'Brien*, 4 Park. Cr. 203.

86. **Fourth subdivision.**—On a motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be fully set forth or the motion must be overruled. *Perry v. Cochran*, 1 Cal. 180.

87. An application for a new trial, on the ground of newly discovered evidence, must show affirmatively that the evidence is new, material and not cumulative; that the applicant has used due diligence in preparing his case for trial; and that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not distinctly in issue on the trial, or even then known or investigated by proof. *Bartlett v. Hogdon*, 3 Cal. 57; *Brooks v. Lyon*, Id. 114; *Burrett v. Gibson*, Id. 399; *Live Yankee Co. v. Oregon Co.*, 7 Id. 42.

88. It is not good ground for a new trial, that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Berry v. Metzler*, 7 Cal. 418.

89. In cases of conflicting testimony, newly discovered evidence, merely cumulative, is no ground for a new trial. *Taylor v. California Stage Co.*, 6 Cal. 228.

90. A new trial on the ground of newly discovered evidence, should not be granted where such evidence is merely cumulative, and is that of a witness whose deposition was used on the trial, and particularly where the verdict shows that the jury disbelieved his first statement. *Gaven v. Dupman*, 5 Cal. 342.

91. A party ought not to rely upon his own single unsupported statement, on a motion for a new trial, of the newly discovered evidence, but should, if possible, procure the affidavits of the persons whose testimony he deems material, so that the Court may be satisfied as to what facts he will testify. *Rogers v. Huie*, 1 Cal. 433. If the affidavits of such persons cannot be obtained in time, additional time should be applied for. *Jenny Lind Co. v. Bowers*, 11 Cal. 194.

92. Motions for new trial, on the ground of newly discovered evidence, are regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must

show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. (In this case the party himself was present.) *Baker v. Joseph*, 16 Cal. 180.

93. Where it did not appear that the defendant had made any efforts to have his witnesses subpoenaed or to procure their attendance, until the morning of the day for which the cause was set down for trial, and on which it actually was tried: *Held*, that the party had not used proper diligence; and that the decision of the District Court, refusing a new trial, was correct. *Rogers v. Huie*, 1 Cal. 429.

94. A new trial will not be granted, on the ground of newly discovered evidence, which is alleged to be a deed, recorded in the County Recorder's office a year before the trial, and the record of a judgment in the same Court in which the cause was tried. *Weiner v. Lowery*, 11 Cal. 104.

95. Where the report of a referee disclosed some hesitation and doubt in arriving at the conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused, from a doubt as to his powers—he at the same time intimating to the Court, in a supplemental report, that if such newly discovered evidence had been adduced on the trial, the result would probably have been different: *Held*, under the circumstances, it was error in the Court below to refuse a new trial. *Hoyt v. Saunders*, 4 Cal. 345.

96. The rules governing motions for new trials, on the ground of newly discovered evidence, should be strictly applied where the parties have been examined as witnesses on the trial. *Leavy v. Roberts*, 8 Abb. Pr. R. 310.

97. If newly discovered evidence relates to any fact proved or controverted, whether bearing upon the issue directly or collaterally, it is cumulative, and not ground of new trial. *Id.*

98. It is only when a party was wholly free from negligence in preparing for the trial, that he is entitled to a new trial on the ground of newly discovered evidence. *Id.*

99. New trial granted on the ground of discovery of error in account-books produced on the trial. *Butterworth v. Warth*, 4 Bosw. 623.

100. **Fifth subdivision.**—The Court will set aside a verdict, where the damages given are unjustifiable. *McDaniels v. Baca*, 2 Cal. 326.

101. It is a proper exercise of power in a Court to grant a new trial, on the ground of excessive damages, where the verdict is grossly inconsistent in its relation to the facts. *Potter v. Seale*, 5 Cal. 410.

102. The rules by which Courts are governed in setting aside the verdicts of juries, on the ground of excessiveness of damages, considered. *Payne v. The Pacific M. S. S. Co.*, 1 Cal. 33.

103. In an affidavit for a new trial, the allegations of the affiant, that "as he is informed and believes, the damages assessed were excessive, and more than could be recovered on a fair trial of the action," is insufficient as a statement of a meritorious defense upon which to justify any disturbance of the verdict. The facts should be stated from which the Court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim. *Patterson v. Ely*, 19 Cal. 28.

104. It is not error in the Court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 294.

105. An ejectment case tried by the Court found that plaintiff was entitled to the possession of the premises, and that the damages were \$1,566, and gave judgment accordingly. It appears from the evidence that plaintiff was only entitled to one-half, he being a tenant in common with another not a party to the suit, and, on a motion made for the purpose, the Court set aside the judgment and ordered a new trial. The plaintiff concedes that the judgment should have been for one-half, but insists that he should have been offered to remit the excess, and only on his refusal to grant the new trial: *Held*, that the new trial was properly granted, it being discretionary with the Court; if the judgment had been that plaintiff was entitled to the possession of one-half of the premises as tenant in common with another, this Court might have corrected the judgment as to damages, and made it conformable to the findings. But in this case both correspond. *Clarke v. Huber*, 20 Cal.

106. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum. *Palmer v. Reynolds*, 3 Cal. 396. But the excess may be remitted and the judgment stand. *Pierce v. Ryan*, 14 Cal. 420.

107. The plaintiff recovered judgment against the defendant for \$1,000, that sum being the amount of damages awarded by a jury before whom the cause was tried. On motion for a new trial, the Judge of First Instance ordered that the judgment should be set aside, and a new trial granted, unless he would consent to remit four hundred dollars of the judgment which had been rendered in his favor. On appeal from this order: *Held*, that this Court had jurisdiction of the appeal, and the order was reversed and set aside. *Payne v. The Pacific M. S. S. Co.*, 1 Cal. 33.

108. It seems that a verdict for \$3,000, in a suit on an attachment bond, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be deemed excessive and reversed on that ground. *Heath v. Lent*, 1 Cal. 410.

109. In an action for a malicious prosecution, wherein an attachment was issued, the jury gave \$15,000, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the Court could not disturb the verdict, unless it clearly appear that injustice has been done. *Weaver v. Page*, 6 Cal. 685.

110. The Code does not permit a party who has recovered a verdict to move for a new trial on the Judge's minutes, on the ground that the damages awarded him are too small. It authorizes this mode of reviewing the proceeding at the trial only in three cases: upon exceptions, for insufficient evidence, and for excessive damages. By insufficient evidence is intended a case where the verdict is contrary to the evidence—not where the jury have found a verdict on evidence. A verdict for excessive damages is, in one sense, a verdict upon insufficient evidence, but its enumeration in the statute shows that it was not supposed to fall, necessarily or properly, within that class of cases. A verdict upon insufficient evidence, means a verdict for a party upon evidence insufficient to establish his right to recover, and which, therefore, ought not to stand. *Moore v. Wood*, 19 How. Pr. 405.

111. **Sixth subdivision.**—Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Bagley v. Eaton*, 8 Cal. 159.

112. Where there are several separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury, with evidence in support of each, and the verdict is general for the defendants, it cannot be set aside, if it be right as to any one issue, through wrong as to all the others. *Kidd v. Laird*, 15 Cal. 161.

113. The verdict of a jury should not be disturbed, and a new trial granted, when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Johnson v. Pendleton*, 1 Cal. 133; *Scannell v. Strahl*, 9 Id. 177; *Weddle v. Stark*, 10 Id. 303; *Bensley v. Atwell*, 12 Id. 240; *Ritter v. Stock*, 12 Id. 402; *McGarrity v. Byington*, 12 Id. 432; *Visher v. Webster*, 13 Id. 60; *Stevens v. Irwin*, 15 Id. 504.

114. Unless the illegal evidence could have no influence upon the verdict, the presumption is that it did have some weight with the jury, and a new trial should be ordered. *Santillan v. Moses*, 1 Cal. 93.

115. Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive evidence of fraud, the jury may find against such presumption. *Billings v. Billings*, 2 Cal. 107.

116. But when the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the Court by the referee, the proper course is to move to set aside the report and for a new trial. *Branger and Driard v. Chevalier*, 9 Cal. 353.

117. The appellate Court will decline to review the facts of the case, unless an assignment of errors shows that the Court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith v. Phelps*, 2 Cal. 121; *Grinbold v. Sharpe*, 2 Id. 23; *Whitman v. Sutter*, 3 Id. 179.

118. On a question of fact, the plaintiff testified one way, and the defendant directly the contrary, and the defendant introduced a letter of the plaintiff in evi-

dence, written before the commencement of the action, flatly contradicting his testimony: *Held*, that on this evidence a verdict for the plaintiff must be set aside. The jury were bound to disregard plaintiff's oath when thus contradicted. *Boyd v. Colt*, 20 How. Pr. 384.

119. Though a verdict upon conflicting testimony should not be set aside for being against evidence, unless it is very clearly so, yet since, in such cases, very slight considerations may influence the jury to accept the testimony of one witness in preference to that of another, the admission of irrelevant evidence, calculated in any respect to prejudice a party, is ground for setting aside a verdict. *Whiting v. Otis*, 1 Bosw. 420.

120. Where, on the trial of a cause, the jury are instructed in respect to the rule of law which they are to apply, as requested by the defendants, and a verdict passes against them, and they move for a new trial on the ground that the verdict is contrary to evidence, the defendants have a right, for all the purposes of such motion, to insist that such instruction is correct. If on a fair application of the charge, the verdict is contrary to evidence, it will be set aside and a new trial granted. In such a case, it is erroneous to refuse a new trial on the ground that the plaintiff has some equity, disclosed by the evidence, which entitles him to retain the verdict, especially when the pleading neither intimates its nature or existence, nor an intention to assert and enforce it. *Bunten v. Orient Mut. Ins. Co.*, 4 Bosw. 254.

121. **Seventh subdivision.**—For error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashrie*, 13 Cal. 55.

122. The granting a nonsuit on the facts is a question of law, and if the proper exception be taken, may be reviewed on appeal without motion for new trial. *Cravens v. Dewey*, 13 Cal. 42; *Darst v. Rush*, 14 Id. 83.

123. A verdict obtained upon incompetent evidence, may be set aside; but this cannot be done if the evidence were admitted without objection; nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. *McCloud v. O'Neal*, 16 Cal. 392.

124. On motion for new trial, on the sole ground that the verdict is not sustained by the evidence, the Court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. *Id.*

125. In such cases, that which vitiates the verdict is the error of the Court in admitting the evidence; and if the party seeking to set aside the verdict be not in position to take advantage of this error, he cannot object that the evidence was improperly admitted. *Id.*

126. Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal, unless the Court can see that such evidence could not possibly have had an effect upon the jury prejudicial to the appellant. *Innis v. Steamer Senator*, 1 Cal. 462. And the presumption is that it was prejudicial. *Id.* 93.

127. In a suit to recover goods on the ground of fraud in the vendee, the admission of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting. *Coghill v. Boring*, 15 Cal. 213.

128. Where competent evidence was given, which might have had an influence on the mind of the jury in determining whether certain premises in dispute were included within that portion of the *Mission Dolores* which was claimed to be confiscated, or that portion which was said to have been reserved: *Held*, that a new trial should be granted on the ground of the admission of improper testimony. *Santillan v. Moses*, 1 Cal. 92.

129. Whether driving piles in Front street, in the city of San Francisco, (the street being laid out over the waters of the bay) is an obstruction to the free use of the street by the public, is a question of fact for the jury; and when that question was not so submitted, a new trial was granted. *The City of San Francisco v. Clark*, 1 Cal. 386.

130. Although the Supreme Court may be satisfied that the verdict of a jury is reasonable in amount, a new trial will be granted where an erroneous instruction has been given by the District Judge, which may have influenced the verdict. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

131. The whole charge of a District Judge to the jury should be taken together,



and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted, although some of the instructions may in slight respects be repugnant to each other. *Carrington v. Pacific Mail S. S. Co.*, 1 Cal. 478.

132. Instructions of the Court to the jury must all be taken together, and if, where thus viewed, the case appears to have been fairly presented to the jury, the verdict will not be disturbed. *Dwinelle v. Henriquez*, 1 Cal. 390.

133. An erroneous instruction will be disregarded, if the jury came to the proper understanding, and rendered a correct judgment. *Haskell v. McHenry*, 4 Cal. 411.

134. Though instructions may not be technically correct, yet if the questions upon which the case turns seem to have been fairly put to the jury, and the verdict sustained by the testimony, the Supreme Court will not interfere. *Smith v. Harper*, 5 Cal. 331.

135. The Supreme Court will not disturb the instructions of the District Court to the jury, on the ground there was no evidence upon which to base them, when there was some evidence, although it may have been slight. *Pelberg v. Gorham*, 10 Cal. 125.

136. In considering whether a single proposition contained in a charge is erroneous, it is to be construed in connection with the context. The whole charge, or so much of it as is connected with and tends to modify or explain the part claimed to be objectionable, is to be considered in determining whether an error has been committed. Admitting that the part of the charge excepted to, when isolated from the context, is erroneous, yet a new trial is not to be granted for that cause, when it appears that the jury could not have been misled thereby. *Sperry v. Miller*, 16 N. Y. (2 E. P. Smith's) R. 407.

137. It is not ground of setting aside a verdict that evidence was rejected at one stage of the trial, the material points of which were afterwards admitted. *Morgan v. Reid*, 7 Abb. Pr. R. 215.

138. A new trial will be ordered on the ground of the improper exclusion of a witness, although it does not appear probable that his testimony could affect the result. *Brown v. Richardson*, 20 N. Y. (6 Smith) 472, 476.

139. It seems that a new trial will not be granted on account of an express in the charge which could not, under the circumstances, have misled the jury. *C. B. [N. S.] 740*; *Johnson v. Hudson R. R. Co.*, 20 N. Y. (6 Smith) 65, 74.

140. In an action on an indorsement by a corporation of negotiable paper questions whether the indorsement was for accommodation of a third party of the benefit of the corporation, and if an accommodation indorsement, whether plaintiff took the note on representations of the officers of the corporation it was otherwise, are questions for the jury. If the Judge decides these points a new trial should be granted. *Bridgeport City Bank v. Empire Stone Dressing*, 30 Barb. 421.

141. In an action to recover damages, under the statute, for the death of a person caused by the wrongful act or neglect of the defendant, notwithstanding the statute makes the jury the judges of the measure of damages, it is the duty of the court to give their definite instructions as to what may or may not properly be taken into consideration in estimating the pecuniary loss; and if explicit instructions are refused, when asked to be given, or erroneous instructions are given, it is cause for a new trial. *Green v. Hudson River R. R. Co.*, 32 Barb. 25.

142. On the trial of an action upon a written contract, questions arose as to its construction, as to the admissibility of evidence, as to whether the acts of the parties did not amount to an abandonment of it, and as to the rule of damages, if a recovery were allowed; and a motion to dismiss the complaint was made and denied. Exceptions were taken upon either side to the rulings of the Court upon these points. The Court directed a verdict for the plaintiff for the amount claimed, subject to the opinion of the Court at general term: *Held*, a mis-trial; and that a new trial must be had. *Havemeyer v. Cunningham*, 8 Abb. Pr. R. 1.

143. **The Court may impose terms.**—The Court may impose terms upon granting a new trial. *Battelle v. Conner*, 6 Cal. 140.

144. Where a party complies with the terms imposed, and avails himself of the advantage of the order, he cannot afterward question its correctness. *Id.*

145. The terms of new trials are peculiarly within the discretion of the Court, with the exercise of which the appellate Court will not interfere, except on a clear showing of abuse or grossly unreasonable terms. *Rice v. Gashirie*, 13 Cal. 54.

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146. The Court may require a remittitur of a portion of an excessive judgment, or grant a motion for a new trial. *Benedict v. Copen*, 4 Cal. 382.

147. When a new trial was to be had on payment of costs: *Held*, that the acceptance of costs did not waive the right to appeal from the order granting a new trial. *Tyson v. Wells*, 1 Cal. 378.

148. It is not error in the Court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 296.

§ 194. *When application for new trial to be made upon affidavit or statement.*

When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it shall be made upon affidavit; for any other cause, it shall be made upon a statement prepared as provided in the next section.

1. Where a motion for a new trial is made on the ground of surprise, the affidavits on which the motion is founded should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses on a new trial: *Held*, where the affidavits did not set forth the facts to which the party expected his witnesses would testify, that a new trial was properly refused. *Rogers v. Huie*, 1 Cal. 429.

2. The affidavits of the witnesses themselves should also, if practicable, be procured, setting forth the facts, within their knowledge, to which they can testify in case a new trial should be granted. *Id.*

3. A notice of motion for new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 8 Cal. 513.

§ 195. *Notice of motion for new trial; when and how statements or affidavits to be made and filed.*

[1861.] The party intending to move for a new trial shall give notice of the same, as follows: When the action has been tried with a jury, within five days after the rendition of the verdict; and when the action has been tried by the Court or a referee, within ten days after receiving written notice of the filing of the findings of the Judge, or the report of the referee; and he shall within five days after giving such notice, or within such further time, not exceeding twenty days, as the Court, or the Judge thereof, may by order grant, prepare and file with the Clerk the affidavit required by the last section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, or within such further time as the parties may agree upon, or the Court or Judge thereof may by order grant, the right to move for a new trial shall be deemed waived. The grounds of the motion shall be specifically set forth, and the statement shall contain so much of the evidence, or reference thereto, as may be

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necessary to explain them, and no more; such statement, when not agreed to by the adverse party, shall be settled by the Judge upon notice; \* when agreed to, it shall be accompanied by the certificate of the parties or their attorneys, that the same has been agreed upon and is correct; and when settled by the Judge, the same shall be accompanied with his certificate, that the same has been allowed by him and is correct; on the argument, reference may also be made to the pleadings, depositions and documentary evidence on file, and to the minutes of the Court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing; any counter affidavits shall be filed with the Clerk one day at least previous to the hearing; the affidavits and counter affidavits, or the statement thus used in connection with such pleadings, depositions and minutes of the Court as are read or referred to on the hearing, constitute, without further statement, the papers to be used on appeal from the order granting or refusing the new trial. To identify the affidavits, it shall be sufficient for the Judge or Clerk to indorse them at the time, as having been read or referred to on the hearing. To identify any depositions or minutes of the Court read or referred to on the hearing, it shall be sufficient that the Judge designate them in his certificate as having been thus read or referred to.

1. **Time of filing notice.**—A motion for a new trial must be made within the statutory time, unless there be circumstances which take the case out of the general rule. *Elliott v. Osborne*, 1 Cal. 396; *Dennison v. Smith*, Id. 437.

2. An injunction order restrains the acts of parties, but it does not stay the running of time, and the effect of it cannot be to postpone the statutory time required in giving notice of a motion for a new trial. *Elliott v. Osborne*, *supra*.

3. A party failing to give notice in time of his intention to move for a new trial, or to file his statement in time, waives his right to move for a new trial. *Caney v. Silverthorn*, 9 Cal. 67.

4. Notice of motion for new trial, given one day before judgment rendered, and six days after filing the report of the referee, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of judgment, the notice was premature, and the proceedings on the motion are void. *Mahoney v. Caperton*, 15 Cal. 313.

5. On the rendition of a special verdict, the trial is terminated, and notice of motion for new trial must be given within the statutory time thereafter, or the proceedings based upon such notice will be disregarded. *Allen v. Hill*, 16 Cal. 113.

6. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76.

7. A stipulation to refer the whole matter is a waiver of any objection that the

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\* See Appendix, "Act concerning Courts," § 25, as to the time within which a Judge may sign and settle statements on motions for new trials.

motion for a new trial and to set aside the award was not made in statute time. *Healey v. City of San Francisco*, 4 Cal. 2.

8. **Notice, what is.**—When the statute speaks of notice of motion, it means written notice, or notice in open Court of which a minute is made by the Court. *Borland v. Thornton*, 12 Cal. 448.

9. **Notice, effect of, as a stay.**—A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment and preserves all rights, until it can be heard and determined, and is not affected by the adjournment of the Court for the term. *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 105.

10. Pendency of a motion for a new trial, does not operate as a suspension of an injunction. *Ortman v. Dixon*, 9 Cal. 23.

11. **Notice must be perfected by filing statement in proper time.**—A notice of a motion for a new trial, unaccompanied by the affidavit or statement required by the statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 8 Cal. 510.

12. Where the statement, on motion for a new trial is not filed within the time prescribed by law, this Court will only look to the judgment roll. *Safferty v. Brownlee*, 11 Cal. 132.

13. An order for a new trial set aside, where the defendant had not filed a statement as required by the one hundred and ninety-fifth section of the Practice Act. *Hill v. White*, 2 Cal. 306.

14. **Statement may be received upon good cause shown after statutory time has expired.**—On motion for new trial the Court below should not, unless good reason be shown, receive an affidavit made after the time for filing affidavits or statements on the motion has elapsed. *Howe v. Briggs*, 17 Cal. 385.

15. **Statement, what should contain.**—In a statement for a new trial the evidence may be simply referred to, and need not be set out in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. *Dickinson v. Van Horn*, 9 Cal. 207. A statement to be recorded on appeal, must be entire. *Hutchinson v. Bours*, 13 Cal. 50.

16. A rule of the District Court, requiring a party on motion for new trial to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell v. McKune*, 14 Cal. 230.

17. The finding of the Court need not be embodied in the statement or bill of exceptions. *Reynolds v. Harris*, 8 Cal. 618.

18. Where no grounds or reasons are stated, on motions for nonsuit and new trial, and no exceptions taken to instructions of the Court, errors cannot be assigned. *Holverstot v. Bugby*, 13 Cal. 44.

19. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wings v. Owens*, 9 Cal. 247.

20. The object of a statement, as provided by our statute, is to make that record which before was not record, and which rests only in the recollection of the Courts, or counsel, or the minutes of the Clerk. *Johnson v. Sepulveda*, 5 Cal. 149.

21. **Statement may be amended.**—A statement, on motion for a new trial, regularly settled and signed by the Judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the Judge, so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. *Valentine v. Stewart*, 15 Cal. 387.

22. *Valentine v. Stewart*, (15 Cal. 396) that the Court below may allow an amendment to a statement on a motion for a new trial, by adding the grounds of the motion after the time for filing a statement has passed, affirmed by *Loucks v. Edmondson*, 18 Cal. 203.

23. A statement agreed on by parties should not probably be amended by the Court on motion, unless under a very clear showing of mistake or fraud. *Hutchinson v. Bours*, 13 Cal. 52.

24. **Statement, settlement and authentication of.**—A statement which was filed in the Court below on motion for a new trial, and is neither agreed

to by counsel, nor settled by the Judge trying the case, has not sufficient authentication to constitute any portion of the record which this Court can notice. *Doyle v. Seawall*, 12 Cal. 425; *Paige v. O'Neal*, 12 Id. 492.

25. The certificate of a Judge is a sufficient authentication of a statement; and where a party does not think proper to file amendments, or the Judge to correct the statement, the certificate of that fact by the Judge is all that is necessary. *Redman v. Gulnac*, 5 Cal. 148.

26. If the statement filed in support of a motion for a new trial is not settled by the Judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be settled by the Judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected. *Sinn v. Twist*, 3 Cal. 89.

27. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Battersby v. Abbott*, 9 Cal. 568.

28. **Statement, authentication of, may be waived.**—Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the Judge. *Dickinson v. Van Horn*, 9 Cal. 207.

29. When it appears from the bill of exceptions, signed by the Judges, that the motion for new trial was heard on statement, counter statement and affidavits, it cannot be objected that the statement was not settled. *Williams v. Gregory*, 9 Cal. 76.

30. A statement on motion for new trial, signed by the Judge and appearing, from the minutes of the Court, to have been used on the hearing of the motion, is sufficiently authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the Judge, is sufficient. *Kidd v. Laird*, 15 Cal. 161.

31. The Courts should look at the substance of the contents of the statement, and disregard its imperfections in form. *Ringgold v. Haven*, 1 Cal. 113.

32. **Evidence on hearing of motion for new trial.**—A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the Supreme Court," includes an appeal from the judgment, as well as an appeal upon the decision for the motion for a new trial. *Hastings v. Halleck*, 13 Cal. 207.

33. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by defendants in a new trial. *Turner v. McIlhenny*, 8 Cal. 579.

34. **Motion for new trial may be abandoned.**—Plaintiff recovered judgment, and defendants gave notice of their intention to move for a new trial, and filed a statement of the grounds. Plaintiff filed a counter statement, but afterwards, at a meeting of the parties before the Judge at Chambers to settle the statement, informed the Judge and defendants that the statement need not be settled, as he would consent to a new trial; whereupon, defendants gave notice of a motion to withdraw their motion or proceedings for new trial. Refused, and a new trial granted: *Held*, that the Court erred; that the defendants had a right to move or not to move for a new trial upon the notice given, and if they chose to abandon their proceedings, whether before or after the motion for new trial was made, they had the right so to do. *Stoyell v. Cole*, 19 Cal. 602.

35. **Motion to strike out statement.**—A notice of a motion to strike out a "statement on motion for a new trial," must specify the grounds upon which the motion will be made, and wherein the statement is insufficient; and where the notice stated that the motion would be made for the reason that the statement was "insufficient and not a lawful statement," the motion was properly overruled. *Id.*

### § 196. *Motion to be made without delay.*

The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement.

See Appendix, Title "Courts," § 25.

1. The District Courts cannot grant a new trial or interfere in any way with their judgments or decrees, in any material part, after the adjournment of the term in which they are rendered. *Robb v. Robb*, 6 Cal. 21.

2. Where a judgment was entered in May, and a new trial granted in September following, it was held, that after the expiration of a term of the District Court, no power remains in it to set aside a judgment or grant a new trial. *Baldwin v. Kramer*, 2 Cal. 582.

3. The fact that instructions given by the Court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion or for a new trial. *Visher v. Webster*, 13 Cal. 58.

4. The Judge below is presumed to know what instructions he gave the jury, and if those written are out of the way, he may resort to other evidence or his own memory. *Id.*

5. Pending a motion for new trial, taken under advisement for decision in vacation by consent of parties, another term of the Court intervenes, when, upon some incidental motion, the cause was continued and the Court adjourned: *Held*, that continuance was only a continuance of the motion for new trial, and did not affect the power of the Court to act on the motion at its convenience. *Hutchinson v. Bours*, 13 Cal. 50.

6. A party cannot appeal from an order overruling a motion for new trial, when he fails to prosecute his motion before the District Court, especially when the case involved complicated facts, and was not tried by the Judge but by a referee, by whom the alleged errors were committed. *Mahoney v. Wilson*, 15 Cal. 42.

7. A failure to prosecute a motion for a new trial when it comes up for argument, operates as an abandonment of the motion, and the order made, denying the motion for such failure to appear, is not the subject of review on appeal. *Frank v. Doane and Green v. Doane*, 15 Cal. 302.

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## CHAPTER VIII.—*The manner of giving and entering judgment.*

SEC. 197. *Judgment to be entered in twenty-four hours, etc.*

198. *Case may be brought before the Court for argument.*

199. *When counter claim established exceeds plaintiff's demand.*

200. *In replevin, judgment to be in the alternative, and with damages.*

201. *Judgment book to be kept by the Clerk.*

202. *If a party die after verdict, judgment may be entered, but not to be a lien.*

203. *Judgment roll, what to constitute.*

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31. The Courts should look at the substance of the contents of the statement, and disregard its imperfections in form. *Ringgold v. Haven*, 1 Cal. 113.

32. **Evidence on hearing of motion for new trial.**—A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the Supreme Court," includes an appeal from the judgment, as well as an appeal upon the decision for the motion for a new trial. *Hastings v. Halleck*, 13 Cal. 207.

33. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by defendants in a new trial. *Turner v. McIlhenny*, 8 Cal. 579.

34. **Motion for new trial may be abandoned.**—Plaintiff recovered judgment, and defendants gave notice of their intention to move for a new trial, and filed a statement of the grounds. Plaintiff filed a counter statement, but afterwards, at a meeting of the parties before the Judge at Chambers to settle the statement, informed the Judge and defendants that the statement need not be settled, as he would consent to a new trial; whereupon, defendants gave notice of a motion to withdraw their motion or proceedings for new trial. Refused, and a new trial granted: *Held*, that the Court erred; that the defendants had a right to move or not to move for a new trial upon the notice given, and if they chose to abandon their proceedings, whether before or after the motion for new trial was made, they had the right so to do. *Strawell v. Cole*, 10 Cal. 600.

*Amendment to Sec. 196.—Passed April 20th, 1863.*

[Takes effect sixty days after passage.]

§ 196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement, and the Court or Judge granting or refusing a new trial shall state in writing the grounds upon which the same is granted or refused.

1. The District Courts cannot grant a new trial or interfere in any way with their judgments or decrees, in any material part, after the adjournment of the term in which they are rendered. *Robb v. Robb*, 6 Cal. 21.

2. Where a judgment was entered in May, and a new trial granted in September following, it was held, that after the expiration of a term of the District Court, no power remains in it to set aside a judgment or grant a new trial. *Baldwin v. Kramer*, 2 Cal. 582.

3. The fact that instructions given by the Court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion or for a new trial. *Visher v. Webster*, 13 Cal. 58.

4. The Judge below is presumed to know what instructions he gave the jury, and if those written are out of the way, he may resort to other evidence or his own memory. *Id.*

5. Pending a motion for new trial, taken under advisement for decision in vacation by consent of parties, another term of the Court intervenes, when, upon some incidental motion, the cause was continued and the Court adjourned: *Held*, that continuance was only a continuance of the motion for new trial, and did not affect the power of the Court to act on the motion at its convenience. *Hutchinson v. Bours*, 13 Cal. 50.

6. A party cannot appeal from an order overruling a motion for new trial, when he fails to prosecute his motion before the District Court, especially when the case involved complicated facts, and was not tried by the Judge but by a referee, by whom the alleged errors were committed. *Mahoney v. Wilson*, 15 Cal. 42.

7. A failure to prosecute a motion for a new trial when it comes up for argument, operates as an abandonment of the motion, and the order made, denying the motion for such failure to appear, is not the subject of review on appeal. *Frank v. Doane and Green v. Doane*, 15 Cal. 302.

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## CHAPTER VIII.—*The manner of giving and entering judgment.*

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198. *Case may be brought before the Court for argument.*

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200. *In replevin, judgment to be in the alternative, and with damages.*

201. *Judgment book to be kept by the Clerk.*

202. *If a party die after verdict, judgment may be entered, but not to be a lien.*

203. *Judgment roll, what to constitute.*

204. *Judgment lien, when it begins and when it expires.*

205. *Docket, how kept, and what to contain.*

206. *Docket to be open for inspection without charge.*

207. *Transcript to be filed in any county, and judgment to become a lien there.*

208. *Satisfaction of a judgment, how made.*

§ 197. *Judgment to be entered in twenty-four hours, etc.*

When trial by jury has been had, judgment shall be entered by the Clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the Court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

1. A Court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the Court. *Morrison v. Dapman*, 3 Cal. 255.

2. A judgment cannot be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson v. Bell*, 9 Cal. 321.

3. The act of the Clerk in entering the judgment is a mere ministerial act. *McMillan v. Richards*, 12 Cal. 468.

4. Upon the coming in of a verdict, in a trial by jury, it is the duty of the Clerk, unless a different direction is given by the Court, to enter a judgment in conformity with the verdict. *Morrison v. New York & New Haven R. R. Co.*, 32 Barb. 568.

§ 198. *Case may be brought before the Court for argument.*

[1854.] When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the Court for argument.

1. When the statute speaks of notice of motion, it means written notice, or notice in open Court of which a minute is made by the Court. *Borland v. Thornton*, 12 Cal. 448.

§ 199. *When counter claim established exceeds plaintiff's demand.*

If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

N. Y. Code, § 263.

§ 200. *In replevin, judgment to be in the alternative, and with damages.*

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

N. Y. Code, § 277.

1. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

2. The rule is, that when property converted has a fixed value, the measure of damages is that value with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Id. 555.

3. The damages, when the property has been delivered, is the legal interest on the value thereof during the detention. *Nickerson v. Chatterton*, 7 Cal. 568; *Douglass v. Craft*, 9 Id. 562.

4. This judgment must be in the alternative, or the bond is not liable. *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Id. 568.

5. If the plaintiff takes the property, the defendant must claim its return in his answer, to enable the Court to give the judgment in the alternative form. *Gould v. Scannell*, 13 Cal. 430.

### § 201. *Judgment book to be kept by the Clerk.*

The Clerk shall keep, among the records of the Court, a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

N. Y. Code, § 280.

### § 202. *If a party die after verdict, judgment may be entered, but not to be a lien.* —

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§ 197. *Judgment to be entered in twenty-four hours, etc.*

When trial by jury has been had, judgment shall be entered by the Clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the Court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

1. A Court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the Court. *Morrison v. Dapman*, 3 Cal. 255.

2. A judgment cannot be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson v. Bell*, 9 Cal. 321.

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[1854.] When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the Court for argument.

1. When the statute speaks of notice of motion, it means written notice, or notice in open Court of which a minute is made by the Court. *Reed v. -*

*Amendment to Sec. 200.—Passed April 27th, 1868.*

[Took effect immediately.]

§ 200. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.

1. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the *ad damnum* of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

2. The rule is, that when property converted has a fixed value, the measure of damages is that value with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Id. 555.

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4. This judgment must be in the alternative, or the bond is not liable. *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Id. 568.

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The Clerk shall keep, among the records of the Court, a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

N. Y. Code, § 280.

### § 202. If a party die after verdict, judgment may be entered, but not to be a lien.

If a party die after a verdict or decision upon any issue of fact, and before judgment, the Court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

### § 203. Judgment roll, what to constitute.

[1862.] Immediately after entering the judgment, the Clerk shall attach together and file the following papers, which shall constitute the judgment roll:

not answered by any defendant, or proof of service, and the command upon the complaint, that the answering was entered, and a copy of the summons, pleadings, verdict of the Court, Commissioner or referee, all bills of exception taken and filed in said action, copy of orders sustaining or overruling demurrers, a copy of the judgment, and a copy of any orders relating to a change of parties, filed in said action, and a copy of the judgment, and any orders relating to a change of the parties.

N. Y. Code, § 281.

1. A judgment does not depend upon the Clerk performing his duty in making the judgment roll, or in preserving the papers. If the facts necessary to give jurisdiction to the Court exist, the judgment is good. *Rick v. Stockdale*, 18 Cal. 219.

§ 204. *Judgment lien, when it begins and when it expires.*

Immediately after filing a judgment roll, the Clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed, it shall become a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

1. A conveyance made without authority will not affect the lien of a judgment. *Smith v. Morse*, 2 Cal. 524.

2. The judgment debtor cannot set up errors in docketing the judgment as destroying its lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operated as a lien; if not, he has no right to complain. *Low v. Adams*, 6 Cal. 277.

3. **Lien cannot be extended.**—The issuing and levy of an execution before the lien of the judgment upon which the execution issued expires, will not operate to prolong the lien of the judgment beyond the time limited in section two hundred and four of the Code. *Isaac v. Swift*, 10 Cal. 71.

4. It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified. *Id.*

5. The levy and sale must both be made within the period of two years limited by statute. *Id.*

6. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the *remittitur* from the appellate Court. *Devey v. Latson*, 6 Cal. 130.

7. If an undertaking on appeal to the Supreme Court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Guy v. Du Uprey*, 16 Cal. 194.

8. **What property is subject to.**—The lien of a judgment is purely the creature of statute; and in this State, the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor, "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the Court. *Ackley v. Chamberlain*, 16 Cal. 181.

9. The statutory lien of a judgment upon the real estate of the judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 428.

10. A judgment recovered against the husband does not become a lien on the homestead, and a sale of the homestead upon an execution issued on such judgment is void. *Ackley v. Chamberlain*, 16 Cal. 181.

11. Where, in a foreclosure suit, the judgment is in the usual form—ascertaining the amount due, directing a sale of the mortgaged premises, application of the proceeds to the payment of the debts, providing for the recovery of any deficiency, and authorizing execution for the same—such judgment does not become a lien on the real estate of the debtor from the time it is docketed. *Chapin v. Broder*, 16 Cal. 403.

12. *Query:* Whether a leasehold estate for a term of years is property in such

sense that a judgment docketed becomes a lien thereon. *McDermott v. Burke*, 16 Cal. 580.

13. In this State, a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor. *Bowman v. Norton*, 16 Cal. 213.

14. A judgment obtained and docketed in the Superior Court of the city of San Francisco, became a lien upon the real property of the judgment debtor, not exempt from execution, within the county of San Francisco. *Bowman v. Hovious*, 17 Cal. 471.

15. **What does, or does not release a lien.**—The payment by a judgment debtor of the judgment, after a Sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the Sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarty v. Christie*, 13 Cal. 79.

16. The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 277.

17. The Act of April, 1856, creating San Mateo county out of a portion of the territory of the county of San Francisco, did not destroy or affect judgment liens then existing; but such liens continued upon the land of the judgment debtor, not exempt from execution, until the expiration of the statutory period, without recording the judgment in the county of San Mateo, where the lands lie. And recording the judgment in this latter county, after the lien was exhausted by the expiration of the two years from the time of its docketing in the Superior Court, will not revive the lien. *Bowman v. Hovious*, 17 Cal. 471.

#### § 205. *Docket how kept, and what to contain.*

The docket mentioned in the last section is a book which the Clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals, when taken; judgment of appellate Court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.

#### § 206. *Docket to be open for inspection without charges.*

The docket kept by the Clerk shall be open at all times during office hours, for the inspection of the public without charge; and it shall be the duty of the Clerk to arrange the several dockets kept by him in such a manner as to facilitate their inspection.

#### § 207. *Transcript to be filed in any county, and judgment to become a lien there.*

A transcript of the original docket, certified by the Clerk, may



be filed with the Recorder of any other county; and from the time of the filing, the judgment shall become a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

See § 237. N. Y. Code, § 282.

1. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the *remititur* from the appellate Court. *Dewey v. Latson*, 6 Cal. 130.

2. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor for any deficiency which, when docketed, becomes a lien. But the mere contingent provision for execution in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a lien, until the amount of the deficiency has been ascertained and fixed. And the lien does not commence to run until the deficiency be ascertained, and an execution be issued therefor. *Chapin v. Broder*, 16 Cal. 420.

### § 208. *Satisfaction of a judgment, how made.*

Satisfaction of a judgment may be entered in the Clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the Clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within one year after the judgment, by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the Court may compel it, or may order the entry of satisfaction to be made without it.

1. A levy under execution on sufficient property to satisfy it is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 30.

2. Before suit brought, the plaintiffs agreed with their attorneys, that if the latter brought this action and recovered, they should have one-third of the judgment and costs as compensation. After judgment and execution issued, the plaintiffs compromised with the defendant for less than the amount of the judgment, and entered satisfaction upon the record: *Held*, that the attorneys had no lien on the judgment, and could not disturb the satisfaction entered by the plaintiffs. *Mansfield v. Dorland*, 2 Cal. 507.

## TITLE VII.

## OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.—*The execution.*

- SEC. 209. *Within what time an execution may issue.*
210. *Who may issue it ; its form ; to whom directed ; and what it shall require.*
211. *When all the defendants were not served with summons, what to direct.*
212. *When made returnable.*
213. *Money judgments and others, how enforced.*
214. *Repealed.*
215. *When execution may issue against the property of a party after his death.*
216. *Execution may be issued to the Sheriff of any county ; when against the property of the defendant ; otherwise when it requires the delivery of real and personal property.*
217. *What shall be liable to be seized in execution ; not to be affected till a levy is made.*
218. *When property is claimed by a third party ; how the right of property to be tried.*
219. *What property shall be exempt from execution.*
220. *Writ, how executed.*
221. *Notice of sale under execution, how given.*
222. *Selling without notice, what penalty attached.*
223. *Sales, how conducted ; neither the officer conducting it nor his deputy to be a purchaser ; real and personal property, how sold ; judgment debtor if present may direct order of sale, and the officer shall follow his directions.*
224. *If purchaser refuses to pay purchase money, what proceedings.*
225. *Court or Justice may proceed in a summary manner against a purchaser refusing to pay ; officer may refuse such purchaser's bid after.*

- 226. *These two sections not to make officer liable beyond a certain amount.*
- 227. *Personal property capable of manual delivery, how delivered to purchaser.*
- 228. *Personal property not capable of manual delivery, how sold and delivered.*
- 229. *Real property, when absolute sale or not ; in the latter case, what the certificate must contain.*
- 230. *Real property so sold by whom it may be redeemed.*
- 231. *When it may be redeemed ; and redemption money.*
- 232. *When judgment debtor or other redemptioner may redeem.*
- 233. *In cases of redemption, to whom the payments are to be made.*
- 234. *What must a redemptioner do, in order to redeem.*
- 235. *Until the expiration of redemption time, Court may restrain waste on the property ; what shall be considered waste.*
- 236. *Rents and profits, who is to receive.*
- 237. *If purchaser of real property be evicted for irregularities in the sale, what shall he recover, and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.*

§ 209. *Within what time an execution may issue.*

The party in whose favor judgment is given may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

N. Y. Code, § 283. J. P. See §§ 214, 601, 602.

§ 210. *Who may issue the execution, its form, to whom directed and what it shall require.*

The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the Court, the county, where the judgment roll is filed, the names of the parties, the judgment, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the Sheriff substantially as follows :

*Fourth*—If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section two hundred of this act, it shall also require the Sheriff to satisfy the same in the kind of money or currency in which said judgment is made payable, and the Sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The Sheriff collecting money or currency in the manner required by this act, shall pay to the plaintiff, or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

*Fifth*—If it be for the delivery of the possession of real or per-

*Amendments to Secs. 210 and 211.—Passed April 27th, 1868.*

[Took effect on passage.]

§ 210. The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the Court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section two hundred of this act, the execution shall also state the kind of money or currency in which the judgment is payable, and shall require the Sheriff, substantially as follows:

*First*—If it be against the property of the judgment debtor, it shall require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or any time thereafter.

*Second*—If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the Sheriff to satisfy the judgment, with interest, out of such property.

*Third*—If it be against the person of the judgment debtor, it shall require the Sheriff to arrest such debtor, and commit him to the jail of the county until he pay the judgment, with interest, or

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*Fourth*—If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section two hundred of this act, it shall also require the Sheriff to satisfy the same in the kind of money or currency in which said judgment is made payable, and the Sheriff shall refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The Sheriff collecting money or currency in the manner required by this act, shall pay to the plaintiff, or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

*Fifth*—If it be for the delivery of the possession of real or per-

*Amendments to Secs. 210 and 211.—Passed April 27th, 1863.*

[Took effect on passage.]

§ 210. The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the Court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in section two hundred of this act, the execution shall also state the kind of money or currency in which the judgment is payable, and shall require the Sheriff, substantially as follows:

*First*—If it be against the property of the judgment debtor, it shall require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or any time thereafter.

*Second*—If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the Sheriff to satisfy the judgment, with interest, out of such property.

*Third*—If it be against the person of the judgment debtor, it shall require the Sheriff to arrest such debtor, and commit him to the jail of the county until he pay the judgment, with interest,



1st. If it be against the property of the judgment debtor, it shall require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or at any time thereafter.

2d. If it be against real or personal property, in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the Sheriff to satisfy the judgment, with interest, out of such property.

3d. If it be against the person of the judgment debtor, it shall require the Sheriff to arrest such debtor, and commit him to the jail of the county, until he pay the judgment, with interest, or be discharged according to law.

4th. If it be for the delivery of the possession of real or personal property, it shall require the Sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the Sheriff to satisfy any costs, damages, rents or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

N. Y. Code, § 289. J. P.

§ 211. *When all the defendants were not served with summons, what to direct.*

When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the Sheriff to satisfy the judgment out of the joint property of all the defendants, and the individual property only of the defendants who were served, or who appeared



in the action. In other respects, the writ shall contain the directions specified in the first subdivision of the last section.

J. P.

1. Where judgment is taken jointly against two defendants, it makes no difference, so far as they are concerned, whether the Sheriff first levied on joint property or not. *Low v. Adams*, 6 Cal. 277.

*When the writ shall have been returned it shall be the duty of the Sheriff to attend the same to the judgment and*  
 § 212. When made returnable.

Sec. 212. The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the Sheriff, to the Clerk with whom the judgment roll is filed. If any real estate be levied upon, the Clerk shall record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "Execution Book," which book shall be indexed with the names of the plaintiffs and defendants in execution, alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge; and shall be evidence of the contents of the originals whenever they or any part thereof may be destroyed, lost, or mutilated.

Sec. 213. Where the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution; when it requires the performance of any other act, a certified copy of the judgment ~~and decree~~ may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same; obedience thereto may be enforced by the Court; and after a final judgment ~~and decree~~ of partition, the Court shall have power to enforce a severance of the possession.

Sec. 214. In all cases other than for the recovery of money, the judgment ~~and decree~~ may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the Court, upon motion, or by judgment for that purpose founded on supplemental pleadings.

le at any time, not less than receipt by the Sheriff, to the filed.

So an execution does not affect the *Low v. Adams*, 6 Cal. 277.

arn, to amend so as to affect rights 6 Cal. 85.

a Court will not permit it to be a to have been guilty of fraud and

tended so as to postpone the rights the correction. *Newhall v. Proctor*,

regularity of the acts of the officers.

properly returned before the sixty 7. It can only be available on a ation. If the debtor does not make advantage of it. *Tyler v. Whitney*,

### § 213. Money judgments and others, how enforced.

Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

See N. Y. Code, § 245. J. P.

1. Where process of a Court, as an execution, commanding the Sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the Sheriff under it; and the authority of the Court to enforce it, cease; and a wrong doer, afterwards trespassing upon the person thus put in possession, cannot be deemed guilty of contempt for disobedience to the process of the Court.—*Per Bennett, J. Loring v. Illsley*, 1 Cal. 24.

### § 214. Repealed.

Arrived 22nd 1866  
60 Days

§ 215. *When execution may issue against the property of a party after his death.*

Notwithstanding the death of a party after the judgment, execution thereon against his property may, upon permission granted by the Probate Court, be issued and executed in the same manner and with the same effect as if he were still living.

J. P.

1. The one hundred and forty-first section of the Act Regulating Estates of Deceased Persons applies only to money judgments, or to such portions of other judgments as require for their satisfaction execution against the general property of the deceased. *Cornell v. Buckelew*, 14 Cal. 641.

§ 216. *Execution, how and to whom issued.*

Where the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any county in the State. Where it requires the delivery of real or personal property, it shall be issued to the Sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

J. P.

§ 217. *What shall be liable to be seized in execution; not to be affected till a levy is made.*

[1862.] All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, shall be liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachments. Gold dust shall be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property shall not be affected by the execution.

J. P. See *ante*, §§ 124, 125, 126, 127, 128; also, *post*, § 219.

1. **Generally.**—Fuller purchased some yokes of oxen of Helm, the appellant, for \$1,000, paid two hundred dollars down, and gave his note, with C. as surety, for the balance; C. signed with the express condition that title to the oxen was to remain in Helm till they were fully paid for—Fuller was to have the absolute use of them. The oxen were placed in the hands of a brother of Helm, who

was in the employ of Fuller as a driver, with the intention of securing the title in Helm. The defendant, a Constable, levied upon and sold the oxen thus situated, as the property of Fuller: *Held*, that the sale by Helm to Fuller was absolute; and that Fuller had such a right of property in them as was subject to execution. *Helm v. Dumas*, 3 Cal. 454.

2. That Helm retained no effective lien upon the property. There was no agreement in writing to that effect; nor did Helm as mortgagee retain possession, but it was under the control and direction of Fuller. The legal consequences of this condition of things cannot be evaded by showing that the property was in the possession of Fuller's hired servant as agent or trustee. *Id.*

3. A Sheriff is not protected in the sale of personal property by the verdict of the jury on a trial of the right of property, under the provisions of section two hundred and eighteen of the Code. The proceedings before the Sheriff, in such a trial, are not judicial. *Perkins v. Thornburgh*, 10 Cal. 189.

4. In a suit against the Sheriff, for not levying the execution, if the Sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the Sheriff required by law. *Strong v. Patterson*, 6 Cal. 156.

5. An officer taking goods under civil process is entitled to notice of the claim of a third party to the goods and a demand for them, to be liable for damages. *Taylor v. Seymour*, 6 Cal. 512; *Daumiel v. Gorham*, *Id.* 43.

6. If several creditors levy, and those prior fail to indemnify the Sheriff, he should relinquish the levy of such and proceed only for the benefit of those who indemnify and incur the responsibility. *Davidson v. Dallas*, 8 Cal. 227.

7. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 27.

8. An agreement to indemnify a Sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right. *Stark v. Raney*, 18 Cal. 622.

10. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the Sheriff is not liable for levying them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 43.

10. Where no such notice or demand was proved, it was error to charge the jury "that the Sheriff was a trespasser, and that they were to find the value of the goods." *Id.*

11. In an action against a Sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand, before bringing suit, otherwise he cannot recover in such action. *Killey v. Scannell*, 12 Cal. 73.

12. **Definitions of the word "property," etc.**—The word "property" includes a judgment. *Adams v. Hackett*, 7 Cal. 203.

13. "Property" is the exclusive right of possessing, enjoying and disposing of a thing; it is the right and interest which a man has in lands and chattels to the exclusion of others; and the word is sufficiently comprehensive to include every species of estate, real and personal. *McKeon v. Bisbee*, 9 Cal. 142.

14. The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. *State of California v. Moore*, 12 Cal. 56.

15. **Issuance of execution.**—A *mandamus* will not lie against the Clerk of the District Court to compel him to issue execution. *Goodwin v. Glazer*, 10 Cal. 333; *Miller v. Sanderson*, *Id.* 490.

16. Where the Clerk of the District Court improperly refuses to issue execution on a judgment rendered in the Court of which he is Clerk, on the ground that the judgment has been attached at the suit of another party, a bill of equity cannot be sustained to release the attachment and compel the Clerk to issue the execution, as the injured party has his remedy at law, by an action on the official bond of the Clerk. *Miller v. Sanderson*, 10 Cal. 489.

17. The Clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 232.

18. The Clerk of the Court has power to issue a *venditioni exponas* at common law, or under the statute "to regulate proceedings in the District Courts," of 1850, page twenty-four, which authorizes the Court to frame new writs and process, and to issue such executions and other writs as may be necessary to carry their judgments into full force and effect. *Smith v. Morse*, 2 Cal. 524.

19. Where a case is remitted from the Supreme Court to a District Court, the Clerk of the latter may issue an execution for the costs accrued thereon without the order of the District Court; nor can the District Court prevent the immediate execution of the judgment. *City of Marysville v. Buchanan*, 3 Cal. 213.

20. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The Court below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

21. An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis v. Robinson*, 10 Cal. 411.

22. An order of Court made, staying all proceedings against a petitioner under the Insolvent Law for a discharge from his debts pending his petition, would not prevent the issuance of an execution on a judgment rendered against the petitioner, and a sale of property under the same, within the time limited for the lien of said judgment. *Isaac v. Swift*, 10 Cal. 71.

23. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the service of the summons and copy of complaint, or because of irregularities of the Clerk in entering the judgment, the District Court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 200.

24. An execution issued upon a judgment of the District Court, rendered in 1850, before the judgment was signed by the District Judge, is void, and a sale under such execution passes no title to the purchaser. *Wells, Trustee, v. Stout*, 9 Cal. 479.

25. No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county it is the duty of the Supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to execute the power, resort may be had to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the Legislature must be invoked for additional authority. *Emeric v. Gilman*, 10 Cal. 404.

26. A judgment unreversed and not suspended may be enforced; but when reversed, it is as if never rendered, and money collected by authority of it may, as a general rule, be recovered back. *Raun v. Reynolds*, 18 Cal. 275.

27. Where an appellant failed to perfect his appeal bond by justification of his sureties, it was error for the Judge of the Court to make an order of *supersedeas* staying the execution. *Mok. Hill Canal & M. Co. v. Woodbury*, 10 Cal. 188.

28. Where an execution on a judgment for money is not stayed by the statutory undertaking on appeal, a sale may be had under the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

29. The facts upon which a judgment of fraud is found must appear affirmatively in a judgment in order to authorize an arrest on final process. *Mattoon v. Eder*, 6 Cal. 60.

30. A confession of judgment to a *bona fide* creditor, and the issuance of execution and making a levy under the same by the judgment debtor without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. *Ryan v. Daly*, 6 Cal. 239.

31. An execution can only be issued upon a judgment obtained before a Justice of the Peace within five years after the entry of the judgment. *White v. Clark*, 8 Cal. 513.

32. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the Court issuing the writ. *Gregory v. Ford*, 14 Cal. 143.

33. In order to take the property of a party upon execution, he must be correctly described by the judgment and execution. The Sheriff can only execute the process against the person or property of the individual named therein. It is not enough that the right man is made to pay the debt. *Farnham v. Hildreth*, 32 Barb. 277.

34. What property may be levied on.—Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a Deputy Sheriff and Constable, seized him, and by force took the bag of coin from him. Plaintiff sues for the seizure and conversion of the coin. Defendants gave in evidence three judgments and executions, in favor of three of their number, and against Alfred A. Green, brother of plaintiff, and offered to prove that the bag of coin was the property of Alfred, and was seized under these executions and applied to their satisfaction. The Court excluded the proof: *Held*, that such exclusion was erroneous; that plaintiff could claim no exemption from the seizure of coin held, as this was, in his hand, as he might, perhaps, in reference to money upon his person. The coin in the hand was, like a horse held by the bridle, subject to seizure on execution against its owner. *Green v. Palmer*, 15 Cal. 411.

35. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: *Held*, that the Sheriff was not liable to C, in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams v. Gorham*, 6 Cal. 68.

36. *Query*: Whether a *chose in action*, as a note or judgment and the like, calling for a definite sum without condition, is the subject of levy and sale. *Crandall v. Blen*, 13 Cal. 15.

37. And if so, then *query*: Whether such levy and sale can be made without actual possession of the *chose* by the officer? *Id.*

38. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 9 Cal. 137.

39. Funds in the hands of a receiver, in a suit for dissolution, are therefore subject to attachment at any time before a final decree of dissolution and distribution. *Adams v. Woods & Haskell, T. A. Lynch, Intervenor*, 9 Cal. 24.

40. Where the execution debtor owns property jointly with another, a Sheriff, who has such execution, has the right to levy on such property and take it into possession, for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 378.

41. The interest of one partner in the partnership chattels is the subject of levy and sale by the Sheriff, on an execution against one of the partners. *Jones v. Thompson*, 12 Cal. 191.

42. In absence of any evidence that the wife has a separate estate, chattels purchased by her, on her personal credit, and in the possession of her husband, are liable to be sold on execution against him. (*Lovell v. Robinson*, 7 How. Pr. R. 105); *Glenn v. Youngval*, 27 Barb. 480; and see *Bass v. Beau*, 16 How. Pr. R. 93.

43. That rolling stock of a railroad company is personal property, and liable as such on execution. *Beardsley v. Ontario Bank*, 31 Barb. 619; (*Stevens v. Buffalo & N. Y. R. R. Co.*, *Id.* 590).

44. A deed of bargain and sale to A, in the usual form, had these words in the *habendum*: "For the use of a Chinese church or place of religious worship and moral instruction, under his direction and in conformity of the rules of the See Yup Company:" *Held*, that the legal title is in A, and that the deed does not raise any use or trust in favor of the grantor or of the See Yup Company; that the company has no equitable title or interest in the property by force of the deed. *Eldridge v. See Yup Co.*, 17 Cal. 44.

45. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors, who have not yet obtained judgment. *Id.*

46. But the Sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones v. Thompson*, 12 Cal. 191.

47. The interest of one partner in the partnership chattels is the subject of levy and sale by the Sheriff on an execution against one of the partners. *Id.*

48. Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz, Administrator, v. Hallett*, 8 Cal. 118.

49. Real estate of a judgment debtor situated in the county where the judgment before a Justice of the Peace was rendered may be sold on execution upon the judgment, whether a transcript of the judgment be filed in the office of the County Recorder for such county or not. *Bickenstaff v. Doub*, 19 Cal. 109.

50. Property includes a judgment. *Adams v. Hackett*, 7 Cal. 203.

51. The interest of one partner or joint owner is subject to levy, and the officer can take possession of the whole. *Waldman v. Broder*, 10 Cal. 379.

52. The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or mere right of possession. *State of California v. Moore*, 12 Cal. 56.

53. What property may not be levied on.—A franchise is not the subject of levy. *Thomas v. Armstrong*, 7 Cal. 286.

54. The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. *Emeric v. Gilman*, 10 Cal. 404.

55. If the Sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley v. Rand*, 12 Cal. 275.

56. A, being indebted to B, delivered a quantity of lumber as security for payment of the debt, with the understanding that B should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A, as his property: *Held*, that the lumber was not subject to seizure under an execution against A, without payment in the first place of his indebtedness to B. *Swanston v. Sublette*, 1 Cal. 123.

57. The mere fact that the judgment debtor—against whom execution had issued—was found upon the mining ground of plaintiff, did not justify the Sheriff, who had the execution, in going on the ground and digging up the soil, and taking the gold it contained. *Rowe v. Bradley*, 12 Cal. 226.

58. After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the Court. And a creditor cannot, after such filing—certainly not after the order staying proceedings—seize the property. The order operates by its own force from its date, and no notice need be given of it to a Sheriff with a writ against the insolvent. *Taft v. Manlove*, 14 Cal. 47.

59. An execution levy upon a county's revenues, in the hands of the Treasurer, is illegal and void. *Gilman v. Contra Costa County*, 8 Cal. 52.

60. In such case, no ouster is necessary to maintain an action of trespass; any unlawful entry is sufficient. An officer, when he puts a receiver in possession of the property of another, against whom he has no process, or asserts through himself, or another, an unlawful dominion over such property, is a trespasser. *Rowe v. Bradley*, 12 Cal. 226.

61. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Orandall v. Blen*, 13 Cal. 15.

62. *Query*: Whether a chose in action, as a note or judgment, and the like, calling for a definite sum without condition, is the subject of levy and sale? *Id.*

63. And if so, then *query*: Whether such levy and sale can be made without actual possession of the chose by the officer? *Id.*

64. A ferry license, being a franchise, is not the subject of levy and sale under execution. *Thomas v. Armstrong*, 7 Cal. 286.

65. Things in action are such property as may be levied upon on execution. *Adams v. Hackett*, 7 Cal. 187.

66. The Sheriff may, on the request of the defendant in execution, properly levy on real estate, though there be personal property present amply sufficient to satisfy the execution. *Smith v. Randall*, 6 Cal. 47.

67. A Sheriff cannot levy upon money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor. *Clymer v. Willis*, 3 Cal. 363.

68. Property in the custody of the law is not liable to seizure, without an order from the Court having charge thereof. *County of Yuba v. Adams*, 7 Cal. 35.

69. Where money has been placed on general deposit in a bank, and negotiable certificates of deposit have been issued to the depositor for the amount, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten. The bankers, by their certificates, become liable, not to refund to the depositor the specific money deposited, but to pay its amount to the holder of the certificates, whoever he may be, on their presentation. *McMillan v. Richards*, 9 Cal. 365.

70. Real estate in another State cannot be sold on execution; and all proceedings under such sale, or intended to give effect to it, are void; or if regular on their face, will be set aside. *Runk v. St. John*, 29 Barb. 585.

71. It seems, where a chattel is delivered upon a bargain for the purchase thereof, and to pay a stipulated price therefor at a future day, and such delivery is upon the express contract that, until the price is paid, the owner parts with, and the person receiving the chattel acquires, no title, the latter takes no interest, before payment, the vendor may recover the property or maintain an action for its value, even from a *bona fide* purchaser at a Sheriff's sale, on an execution against the party to whom the chattel was thus delivered. *Piser v. Stearns*, 1 Hil. 84; compare 15 N. Y. 409.

72. Although the interests of a mortgagor in chattels, before default, may be levied on and sold under execution, yet, where, after default in the mortgage, it is foreclosed, and the property passes into the possession of the mortgagee, the officer becomes a trespasser, if he sells the property and delivers possession to a third person, and is liable in damages to the mortgagee therefor. *Gulhaar v. Ross*, 1 Hilt. 117.

73. **How levy must be made.**—A levy on personal property capable of manual delivery must be made by taking the property in custody. If it is allowed to remain in the hands of the debtor, the levy cannot operate so as to defeat subsequent executions. *Duterte v. Driard*, 7 Cal. 549.

74. A levy may be good as against the defendant in the writ, and not good as to third persons. The conduct of the defendant may make the levy good, by way of waiver, or estoppel, or agreement. *Taft's v. Manlove*, 14 Cal. 47.

75. As to third persons, there can be no levy when the officer does not know the subject of the levy: as where he stands at the door of a store, which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession. *Id.*

76. The voluntary release of the property levied on, by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment. *People v. Chisholm*, 8 Cal. 29.

77. **When execution operates, or not, as a lien.**—Service of a copy of execution and notice of garnishment upon a third party constitutes no lien on property of the debtor in his hands capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 195.

78. Under our statute, an execution affects property only from the time of the levy. *Id.*

79. A levy was made by the Sheriff upon property sufficient to satisfy the execution, and he was in possession for a day and a half; but he afterwards abandoned the levy, because the plaintiff would not indemnify him, leaving the property in the owner's possession: *Held*, no satisfaction of the debt, and a surety was, consequently, not discharged. *Peck v. Tiffany*, 2 Comst. 456; *Waddel v. Elmen-*

*dorf*, 5 Den. 447; *People v. Hopson*, 1 Id. 574; *Radde v. Whitney*, 4 E. D. Smith's C. P. R. 378.

80. **Satisfaction of execution.**—A Sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution; and when he takes a note, indorses it on the execution, and returns it satisfied, the return is not conclusive, and, perhaps, not *prima facie* evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 661.

81. A levy under execution, on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 29.

82. **Sheriff, his powers and liabilities.**—A deputy Sheriff, who seizes property under an attachment, is not authorized, by virtue of his office, to bind the Sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. *Krum v. King*, 12 Cal. 412.

83. **Damages.**—The rule giving vindictive or exemplary damages in cases of malicious trespass, applies as well to officers of the law, acting under color of process, as to private persons. *Nightingale v. Scannell*, 18 Cal. 315.

84. In such a suit—the property seized being a merchant's stock in trade—evidence of the retail value of the goods is inadmissible as a basis for damages. The object of such evidence is to estimate the profits plaintiff might have made by a sale of the goods; and this would be mere conjecture. The value of the goods was what it would cost in the market to replace them. *Id.*

85. In suit against a Sheriff and the plaintiff in a judgment, for a wrongful seizure of property on an execution upon such judgment, the Sheriff, who acted without improper motives, cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the Sheriff. *Id.*

86. Attachment in suit of *B. & Co. v. V., Y. & L.*, as firm of *V. & Co.*, under which defendant, as Sheriff, seized plaintiff's stock in trade, claiming that *L.* was partner of plaintiff: *Held*, that in action by plaintiff against Sheriff for damages, proof of injury to plaintiff's business as a merchant was inadmissible as a criterion of damage. *Dexter v. Paugh*, 18 Cal. 372.

87. A Sheriff who does not return an execution is, *prima facie*, liable for the debt; but may mitigate the damages by showing that the defendant had no property on which the judgment could be levied. Where there was sufficient property, and he has not made the money, nor returned the execution, nor shown any sufficient reason why he has not done so, he is chargeable with the debt. 1 Hill, 275; 6 Id. 550; 4 Sandf. 67; 3 Seld. 550; *Swezey v. Lott*, 21 N. Y. (7 Smith) 481.

218. *When property is claimed by a third party, how the right of property to be tried.*

If the property levied on be claimed by a third person as his property, the Sheriff shall summon from his county six persons, qualified as jurors, between the parties, to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the Sheriff, and if their verdict be in favor of the claimant, the Sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the Sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise, by the plaintiff. On the trial, the



defendant and the claimant may be examined by the plaintiff as witnesses.

J. P.

1. **Suits by claimants.**—P., in possession of a vessel, appoints a master. The plaintiff, who sets up a claim to the vessel, entered into a charter party with P., and by it acknowledges him to be owner, and H., the master appointed by P., to be master of the vessel. After the charter party, the declared owner of the vessel became the debtor of the master, who attached the vessel for his debt. The plaintiff brought this action against the Sheriff to recover the vessel under the attachment: *Held*, that where one permits another to deal with his property as if it belonged to the latter, and by declarations permits others to be misled, such declarations must be considered as addressed to every one in particular who may give credit upon the strength of them, and the party making those must be concluded. *Hosler v. Hays*, 3 Cal. 302.

2. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 512; *Daumiel v. Gorham*, Id. 43.

3. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself, because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. But if he fails to make his claim known, and thus influences the conduct of the officer, he is estopped from afterwards asserting it—provided the facts and circumstances relating to his claim were then known to him. *Blewen v. Freer*, 10 Cal. 131.

4. In a suit against the Sheriff for not levying the execution, if the Sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he rendered the bond of indemnity to the Sheriff required by law. *Strong v. Patterson*, 6 Cal. 156.

5. If several creditors levy, and those prior fail to indemnify the Sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility. *Davidson v. Dallas*, 8 Cal. 227.

6. A Sheriff is not protected in the sale of personal property by the verdict of a jury on the trial of the right of property, under the provisions of section two hundred and eighteen of the Code. The proceedings before a Sheriff, in such a trial, are not judicial. *Perkins v. Thornburgh*, 10 Cal. 189.

7. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 27.

8. An agreement to indemnify a Sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right. *Stark v. Raney*, 18 Cal. 622.

9. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the Sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 43.

10. Where no such notice or demand was proved, it was error to charge the jury "that the Sheriff was a trespasser, and that they were to find the value of the goods. *Id.*

11. In an action against a Sheriff to recover property, seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Killey v. Scannell*, 12 Cal. 73.

### § 219. What property shall be exempt from execution.

[1854, 1862.] The following property shall be exempt from execution, except as herein otherwise specially provided :

1st. Chairs, tables, desks and books, to the value of one hundred dollars, belonging to the judgment debtor.

2d. Necessary household, table and kitchen furniture belonging to the judgment debtor, including stove, stove-pipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use, sufficient for one month.

3d. The farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, two cows, one cart or wagon, and food for such oxen, horses, cows or mules for one month; *also all seed, grain or vegetables actually provided, reserved or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.*

4th. The tools or implements of a mechanic necessary to carry on his trade; the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with the professional library, and the law libraries of an attorney and counselor.

5th. The tent and furniture, including a table, camp stools, bed and bedding of a miner; also, his rocker, shovels, spades, wheelbarrows, pumps and other instruments used in mining, with provisions necessary for his support for one month.

6th. Two oxen, two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, teamster, or other laborer habitually earns his living, and food for such oxen, horses or mules for one month; and a horse, harness or vehicle used by a physician or surgeon in making his professional visits.

7th. All fire engines, with the carts, buckets, hose and apparatus thereto appertaining, of any fire company or department organized under any law of this State.

8th. All arms and accoutrements required by law to be kept by any person. But no article mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price, or upon a mortgage thereon.

9th. All court houses, jails, public offices and buildings, lots, grounds, and personal property, *the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court house, jail and public offices*, belonging to any county of this

State; and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings appertaining to the fire departments, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use.\*

J. P. See also § 243, as to earnings of debtor.

1. **Wagon.**—In the act which exempts certain articles from execution, the term "wagon" is intended to mean a common vehicle for the transportation of goods, wares and merchandise. *Quigley v. Gorham*, 5 Cal. 418.

2. A wagon used by a physician in his business, he being a householder with a family for which he provides, is exempt from execution, under the Laws of 1842, ch. 187. (1 Deur. 128; 1 Comst. 129; 8 How. Pt. 18; Id. 75; 5 Id. 288; 1 Duer, 606); *Van Buren v. Loper*, 29 Barb. 388.

3. **Hackney coach.**—A hackney coach used for the conveyance of passengers is a different article, and does not come within the equity or literal meaning of the act. *Quigley v. Gorham*, 5 Cal. 418.

4. **Team.**—Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. *Calhoun v. Knight*, 10 Cal. 393.

5. "A team," within the meaning of the statute concerning property exempt from execution, consists of one or two horses, with their harness, and the vehicle to which they are ordinarily attached for use. In order to make out a wagon as exempt from execution, it is necessary to show that it is a part of a team which does not exceed two hundred and fifty dollars in value. Proof merely of the value of the wagon is not enough. *Davis v. Prosser*, 32 Barb. 290.

6. What is "a team," considered. *Lockwood v. Younglove*, 27 Barb. 505.

7. **Watch.**—A watch hung up for use in a family having no clock, and which is needed for their daily business, has been held to be exempt from execution. And it seems, that where a watch is actually necessary to the discharge of the debtor's business, and not merely a convenience, it will be included under the term of "working tools." *Bitting v. Vandenburg*, 17 How. Pr. R. 80.

8. **Household furniture.**—Where certain household furniture is claimed as exempt from execution, the fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family is no objection. Such a construction of the statute would be too narrow. *Haswell v. Parsons*, 15 Cal. 266.

\* LAWS OF 1861, pp. 565-566.—CHAPTER D.

*Act exempting Lots in Cemeteries and Pews in Churches from levy and forced Sale.*

SECTION 1. All lots of land owned, used or occupied by any person, or by any person in joint tenancy or tenancy in common with any person or persons, in any graveyard or cemetery, or other place, for the sole purpose of burying the dead, not exceeding one-quarter of an acre in size, together with the railing or fencing inclosing the same, and all gravestones, tombstones, monuments and other appropriate improvements thereon erected, are hereby exempted from levy and forced sale, by virtue of any writ, order, judgment or decree, or by any legal process whatever. And in cases of religious or benevolent associations or corporations, the amount of land so exempt for the purposes aforesaid may extend to not exceeding five acres; provided, that not more than one lot of land shall be held exempt by such person, or by him in joint tenancy or tenancy in common with any person or persons, or by any such association or corporation, in any one cemetery, graveyard or other place; and provided, further, that the provisions of this act shall not be deemed to apply to land held by any person or persons, association or corporation, for the purpose of sale or disposition, as burial lots or otherwise.

SEC. 2. All pews in churches and meeting houses used for religious purposes, owned and claimed by any person, or held agreeably to the rules and regulations of such churches, are hereby exempt from levy and sale on any writ or legal process, or by operation of any law whatever.

9. **When exemption may be claimed.**—Where a party was absent in San Francisco at the time such furniture was sold on execution, on account of sickness in his family, it is sufficient excuse for not claiming the exemption at the time—the defendant (plaintiff in execution) being aware of such claim, it having been made on a previous seizure. *Haswell v. Parsons*, 15 Cal. 266.

10. *Prima facie*, all the personal property of a judgment debtor is liable to levy and sale upon execution. If he would claim exemption for any such property, he must bring himself and such property within the exceptions of some statute by proper proof. *Davis v. Prosser*, 32 Barb. 290.

11. A stipulation in a note or other obligation, that the obligor would waive exemption of his property from execution, is void. (9 How. Pr. 458); *Kneetle v. Newcomb*, 31 Barb. 169.

12. It seems, that where a debtor has property of a description capable of exemption, but of larger amount than the limit of the law, he is entitled to an election as to which portion shall be exempted. *Lockwood v. Younglove*, 27 Barb. 505.

13. **Homestead, what is.**—The question of homestead is a question of fact; and the presumption arising from residence may be defeated by facts and circumstances *aliunde*. *Holden v. Pinney*, 6 Cal. 234.

14. The homestead is the family residence; and in order to constitute a homestead, there must be an actual occupancy, with the intention of dedicating the premises to such purpose. Residence is *prima facie* evidence of such intention, and imports notice. *Id.*

15. The phrase, "resident of this State," used in the second section of the Homestead Act, means an actual and not a constructive presence. *Rise v. McHenry*, 7 Cal. 89.

16. *Query*: Whether premises devoted chiefly to business purposes, though occupied in part by the family, can be claimed as a homestead? *Ackly v. Chamberlain*, 16 Cal. 181.

17. In this case, the premises, consisting of a principal building, with a barn, storehouse and outhouses appurtenant thereto, were held to be a homestead, although the principal building was used as a hotel, as well as a dwelling for the family—it appearing that the land, one hundred and sixty acres, was taken up, and said building originally intended as a residence for the family, and that the nature and extent of the hotel keeping did not interfere with the general character of the premises as such dwelling, and that the entire premises were not worth over \$2,000. *Id.*

18. The separate property of the husband, acquired before marriage, may become the homestead, as well as the common property of husband and wife. *Revalk v. Kraemer*, 8 Cal. 66.

19. Any individual, whether married or not, may be the head of a family, and as such, entitled to a homestead right. *Id.*

20. The homestead right is as much for the benefit of the children as for the benefit of the wife. *Lies v. De Diabler*, 12 Cal. 327.

21. The homestead estate is a sort of joint tenancy, with the right of survivorship as between husband and wife, and cannot be destroyed except by the concurrence of both in the manner prescribed by law. *Estate of Tompkins*, 12 Cal. 114, overruled in *Gee v. Moore*, 14 Cal. 472.

22. A notice of homestead is not required to be filed in the County Recorder's office. *Cook v. McChristian*, 4 Cal. 23.

23. The Homestead Act does apply to and affect property acquired previous to its passage. *Id.* 25; *Moss v. Warner*, 10 Cal. 297.

24. The residence of the husband with his family upon the premises impresses upon them the character of homestead. *Moss v. Warner*, 10 Cal. 297.

25. A sale by a Sheriff, under execution, of a house claimed as a homestead by the defendant in execution, and ascertained by appraisal to be worth over \$5,000, should not be made until an exact appraisal of the value of the premises is obtained, so that the Sheriff can convey a definite fractional undivided interest therein. *Geary v. Estabrook*, 6 Cal. 457.

26. It follows that a deed of the premises, claimed as a homestead, given by the Sheriff to the purchaser at the execution sale, for the excess of value of the premises over \$5,000, conveys an undefined and uncertain interest, upon which the purchaser cannot maintain an action for possession and mesne profits. *Id.*

27. The Constitution is inoperative in itself, and looks to legislation to determine how far and in what manner the homestead should be protected from forced sale. *Cary v. Tice*, 6 Cal. 630; *Pfeiffer v. Riehn*, 13 Cal. 649.

28. The appropriation of premises as a homestead gives the wife a right to insist that their character as a homestead shall continue until she consents to their alienation, or another homestead is provided, or they are otherwise abandoned. *Gee v. Moore*, 14 Cal. 477; *Guid v. Guid*, Id. 507.

29. The wife has no right in the homestead which she can enforce against her husband's consent. She cannot maintain a suit in her individual name. *Guid v. Guid*, 14 Cal. 507.

30. The fact of the dedication of the premises by possession as a homestead was properly submitted to a jury. *Cook v. McChristian*, 4 Cal. 27; *Broaders v. Nelson*, 16 Id. 81.

31. As soon as the place acquires the character of homestead, the nature of the estate becomes changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. *Taylor v. Hargous*, 4 Cal. 273.

32. Land on which a vendor's lien exists for the purchase money may become a homestead, but the homestead right is subordinate to the lien. And after this right has attached, the husband cannot, without the assent of the wife, charge the land by agreement to pay interest in addition to the purchase money. *McHenry v. Reilly*, 13 Cal. 76.

33. **What cannot be claimed as a homestead.**—Where a married man, whose wife had never resided in this State, purchased a lot of land, and resided upon it, which he then mortgaged, his wife not joining therein, and subsequently his wife came to this State, and resided with him on the mortgaged premises: *Held*, that the character of homestead was never impressed upon the premises until the actual residence of the family thereon, and therefore the homestead exemption cannot be sustained against the mortgage. *Cary v. Tice*, 6 Cal. 625.

34. It seems, that a covenant by the husband to convey an undivided interest in the land, executed before any residence of his family on the premises, sustained by a deed made by the husband alone, after the residence of his family and that of his covenantee on the premises, prevents the homestead right from attaching, and that a mortgage executed by the husband alone after the residence of the two families on the land, but before the deed was executed by the husband to his cotenant, will be maintained against the claim of homestead. *Kellersberger v. Kopp*, 6 Cal. 563.

35. The question as to whether buildings used for hotels, stores, etc., are susceptible of dedication for homestead purposes, is reserved. *Geary v. Estabrook*, 6 Cal. 457.

36. Land held by a husband with his wife and child, as tenants in common, is not subject to homestead rights under the laws of this State. *Giblin v. Jordan*, 6 Cal. 416.

37. The parties in such cases are as much tenants in common as though they were entire strangers to each other. *Id.*

38. A widow who has once applied to the Probate Court to have the last residence of her husband and herself set aside as a homestead, and has acquiesced for eighteen months in the order setting it so aside, is concluded by her own acts from afterward claiming a lot on which they formerly resided, merely because she has ascertained that there are liens on the lot first set aside. *Holden v. Pinney*, 6 Cal. 234.

39. On partition, each of the joint tenants receives his portion, subject to the general rules that govern the acquisition of real estate; and if there was no residence after partition of the land, and before claims in suit had become legal charges thereon, it cannot be exempted as a homestead. *Reynolds v. Pirley*, 6 Cal. 165.

40. Land held in joint tenancy is not subject to dedication for homestead purposes; and where the joint tenants make partition, the character of homestead cannot be attached to any portion of it by occupancy as a dwelling place prior to the partition. *Id.*

41. Where the wife, at the date of the execution of a mortgage thereon, was not a resident of the State, the homestead right cannot be sustained. *Benedict v. Busnell*, 7 Cal. 445.

42. Premises never assume the character of a homestead until actual residence thereon by the family. *Id.*

43. B. bought the premises in controversy and executed a mortgage in part payment, which was transferred to the plaintiff. Plaintiff then loaned B. a further sum, canceled the first mortgage, and took another mortgage on the same lot, with another: *Held*, the land could not be claimed as a homestead, and was liable for the remainder of the purchase money. *Dillon v. Byrne*, 5 Cal. 455; *Swift v. Kraemer*, 13 Id. 526.

44. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *McDonald v. Maddux*, 11 Cal. 190.

45. A homestead right cannot be asserted merely to a building, independent of the land upon which the building is erected. *Smith v. Smith*, 12 Cal. 217.

46. Although the wife may have a claim of homestead in the premises, for non-joinder in the deed, yet after her death the right is gone, and does not vest in the husband; nor will her death, during the pending of the suit, alter the rule. *Gee v. Moore*, 14 Cal. 472.

47. There is nothing in the nature of the homestead right or privilege which justifies its designation as a joint tenancy with right of survivorship, although it has been formerly so held by this Court. *Id.*

48. The statute confers no right upon the wife to the homestead independent of the husband, which she can enforce against his consent. It affords protection to him, and only through him to the wife and children. *Guido v. Gourdon*, 14 Cal. 506.

49. **Abandonment of homestead.**—The voluntary removal of the husband, with his family, is not of itself evidence of abandonment of the place as a homestead; much less so, a removal under apprehensions for the safety of his family. *Moss v. Warner and Wife*, 10 Cal. 296.

50. The fact that both husband and wife were anxious to sell their homestead, and the husband had made repeated efforts for that purpose, but failed because a satisfactory price could not be obtained, does not show an intention to abandon the homestead as such. *Dunn v. Tozer*, 10 Cal. 167.

51. The only way in which the right of the wife to the homestead can be extinguished, is by a joint deed executed by both husband and wife, and properly acknowledged. *Id.*

52. The Homestead Act operates upon property acquired previous to its passage, as well as upon that subsequently acquired. *Moss v. Warner and Wife*, 10 Cal. 296.

53. The residence of the husband, with his family, upon the premises, impresses upon them the character of homestead. *Id.*

54. The wife, if surviving her husband, takes the homestead as property set apart by law from her husband's estate for her benefit, and that of her children, if there be any. *Gee v. Moore*, 14 Cal. 472.

55. An order of a District Court setting aside the homestead operates as a protection against other creditors. *Rix v. McHenry*, 7 Cal. 89.

56. The Constitution is inoperative in itself, and looks to legislation to determine how far and in what manner the homestead should be protected from forced sale. *Cary v. Tice*, 6 Cal. 625.

57. As a husband and wife may, by joining in a conveyance, destroy a homestead right already acquired, by selling the whole, so they may equally destroy it by selling an undivided portion of it. *Kellersberger v. Kopp*, 6 Cal. 563.

58. Where the premises have acquired the character of a homestead, by actual occupation with such intention, the estate thus created cannot be destroyed, except by the concurrence of both husband and wife; neither will their removal from the premises operate as an abandonment. *Holden v. Pinney*, 6 Cal. 234.

59. To make a valid sale of the homestead, requires the joint deed of the husband and wife. Separate deeds of the husband and wife are both invalid. *Poole v. Gerrard*, 6 Cal. 71.

60. A., with his wife and five children, occupy premises as a homestead. The wife dies; four children are sent away to a boarding school, and the premises leased by A. to a tenant, who takes possession—one consideration of the lease being, that the tenant should board and take care of an infant child of A. During this lease, and while the tenant is in possession, A. mortgages the premises—having, since executing the lease, but before the mortgage, married his second wife. After

the mortgage, A. and wife got into possession of the premises: *Held*, that the mortgage binds the premises; that A., after the death of his first wife, had the right to dispose of the premises at his sole pleasure, or at his sole will to abandon them as a homestead; that by the lease he did apparently so abandon them—at least, for the term of the lease; that having mortgaged the premises to an innocent party before unequivocally manifesting any purpose of resuming their occupancy, and before the second wife had any rights therein, neither she nor he can complain. *Benson v. Aitken*, 17 Cal. 163.

61. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. De Diablar*, 12 Cal. 327.

62. The removal of the husband and wife from a homestead thus selected, after and in consequence of sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but seems to be the very case against which the statute intended to provide. *Taylor v. Hargous*, 4 Cal. 268; *Holden v. Pinney*, 6 Id. 234; *Moss v. Warner*, 10 Id. 296, overruled in *Harper v. Forbes*, 15 Id. 202.

63. Removal from premises occupied as a homestead by the husband, with his family, is presumptive evidence of their abandonment of the homestead; and this presumption must be rebutted by parties who assert a claim to the premises. *Harper v. Forbes*, 15 Cal. 202.

64. **Homestead rights cannot be transferred.**—A conveyance by the husband and wife of the homestead does not transfer the homestead rights. Such rights may be released and abandoned, but are, in their nature, incapable of sale and transfer. The exemption from forced sale is the personal right of both husband and wife, and the restraint upon the husband's power of alienation is the personal right of the wife alone, and they cannot be assigned to others. *Bowman v. Norton*, 16 Cal. 213.

#### § 220. Writ, how executed.

The Sheriff shall execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, or depositing the amount with the Clerk of the Court; any excess in the proceeds over the judgment and the Sheriff's fees shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the Sheriff's fees, within the view of the Sheriff, he shall levy only on such part of the property as the judgment debtor may indicate; provided, that the judgment debtor be present at, and indicate at the time of, the levy, such part; and provided, that the property indicated be amply sufficient to satisfy such judgment and fees.

J. P.

1. The general statute defines the duties of the Sheriff in respect to final process. It declares, "that the Sheriff shall execute the writ (of *feri facias*) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment debtor." These acts are to be construed in *pari materia*. *Wilson v. Broder*, 10 Cal. 486.

2. Notice of motion to set aside an execution and a levy made thereunder will not operate as a stay of proceedings. *Bryan v. Berry*, 8 Cal. 130.

3. Where a Sheriff or Constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Pelt v. Littler*, 14 Cal. 194.

4. Where an execution on a judgment for the recovery of money is stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution; and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

5. This section was evidently enacted for the benefit of the debtor. *Smith v. Randall*, 6 Cal. 47.

6. Where the execution debtor owns property jointly with another, a Sheriff, who has such execution has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 378.

7. If the master of a vessel be a part owner, his interest in the vessel may be

*Amendment to Sec. 221.—Passed April 27th, 1868.*

[Took effect on passage.]

§ 221. Before the sale of property on execution, notice thereof shall be given as follows:

*First*—In case of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

*Second*—In case of other personal property, by posting a similar notice in three public places in the township or city where the sale is to take place, not less than five nor more than ten days successively.

*Third*—In case of real property, by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also when the property is to be sold, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one.

*Fourth*—When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section shall state the kind of money or currency in which bids may be made at such sale, which shall be the same as that specified in the judgment.



the mortgage, A. and wife got into possession of the premises: *Held*, that the mortgage binds the premises; that A., after the death of his first wife, had the right to dispose of the premises at his sole pleasure, or at his sole will to abandon them as a homestead; that by the lease he did apparently so abandon them—at least, for the term of the lease; that having mortgaged the premises to an innocent party before unequivocally manifesting any purpose of resuming their occupancy, and before the second wife had any rights therein, neither she nor he can complain. *Benson v. Aitken*, 17 Cal. 163.

61. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. De Diablar*, 12 Cal. 327.

62. The removal of the husband and wife from a homestead thus selected, after and in consequence of sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but

3. Where a Sheriff or Constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Pelt v. Littler*, 14 Cal. 194.

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5. This section was evidently enacted for the benefit of the debtor. *Smith v. Randall*, 6 Cal. 47.

6. Where the execution debtor owns property jointly with another, a Sheriff, who has such execution has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 378.

7. If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will in no wise be affected. *Loring v. Illsley*, 1 Cal. 31.

8. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and *chose in action*, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose be given by the levy, and announced at the sale. *Crandall v. Blen*, 13 Cal. 15.

9. Where an execution debtor owns property jointly with another, a Sheriff who has the execution has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 380; *Jones v. Thompson*, 12 Id. 198.

10. The assent of an ordinary agent, who had general charge of his principal's affairs during his temporary absence, will not justify the Sheriff who holds an execution against a third person in levying upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 578.

11. A conveyed land to B, and allowed part of the purchase money to remain unpaid. B afterwards sold part of the land to C, who has no notice of A's lien as a vendor, and gave a mortgage to B for part of the purchase money. A obtained judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: *Held*, that the purchaser at Sheriff's sale did not acquire title to the mortgaged debt due from C to B. *Bryan v. Sharp*, 4 Cal. 351.

12. Where an order of Court directed the Sheriff to seize certain specific property, and the property proved not to belong to the defendant in the suit, the Sheriff was held liable to the owner. *Rhodes v. Patterson*, 3 Cal. 470.

13. Under our statute, an execution affects property only from the time of the levy; and service of a copy of an execution constitutes no lien on property capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196; *Duterte v. Driard*, 7 Id. 551.

14. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not not justify the Sheriff who had the execution in going on the ground and digging up the soil, and taking the gold it contained. *Rouve v. Bradley*, 12 Cal. 230.

15. If the Sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley v. Rand*, 12 Cal. 277.

16. The mere fact that an individual creditor obtains judgment, issues execution and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. *Conroy v. Wood*, 13 Cal. 631.

17. The remedy by motion against a Sheriff and his sureties, to compel him to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the Sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a *bona fide*, well-grounded doubt of the authority of the party to demand it. *Wilson v. Broder*, 10 Cal. 486.

### § 221. Notice of sale under execution, how given.

Before the sale of property on execution, notice thereof shall be given as follows:

1st. In case of perishable property, by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such a time as may be reasonable considering the character and condition of the property.

2d. In case of other personal property, by posting a similar notice in three public places of the township or city where the sale is to take place, not less than five nor more than ten days successively.

3d. In case of real property, by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and publishing a copy thereof once a week, for the same period, in a newspaper in the county, if there be one.

J. P. See § 654.

1. Although the officer neglect to give the notice, the sale shall not be void. *Smith v. Randall*, 6 Cal. 47; *Harvey v. Frisk*, 8 Id. 93.

2. Under the provisions of Revised Statutes, vol. 2, 368, § 36—requiring that the time and place of holding any sale of real estate, pursuant to any execution, shall be publicly advertised previously for six weeks successively, as follows: 1st. A written or printed notice thereof shall be fastened up in three public places in the town where such real estate shall be sold. 2d. A copy of such notice shall be printed once in each week, in a newspaper in such county, if there be one—since the second subdivision requires a publication in the newspaper of a copy, it implies that the publication is to be commenced after the posting, and the publication is regular if the original is posted up six weeks, and a copy is, during the six weeks, published weekly six times, although the full period of six weeks does not elapse after publication commenced, and before the sale. (7 Barb. 39; 1 Seld. 497; 1 Mass. 253;) *Olcutt v. Robinson*, 21 N. Y. (7 Smith) 150.

### § 222. *Selling without notice, what penalty attached.*

An officer selling without the notice prescribed by the last section shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment, (if the judgment be satisfied before sale) shall forfeit five hundred dollars.

J. P.

1. If the Sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against the officer. There is not sufficient cause to set aside or avoid the sale. *Smith v. Randall*, 6 Cal. 47.

§ 223. *Sales, how conducted; neither the officer conducting it, nor his deputy to be a purchaser; real and personal property, how sold; judgment debtor, if present, may direct order of sale, and the officer shall follow his directions.*

All sales of property under execution shall be made at auction

to the highest bidder, and shall be made between the hours of nine in the morning, and five in the afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the Sheriff shall be bound to follow such directions.

1. The statute regulating Sheriffs' sales of real estate does not design to invest a purchaser with the title until six months after the sale. *Duprez v. Moran et al.*, 4 Cal. 196.

2. The regularity of a Sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey v. Dunlap*, 7 Cal. 160.

3. Where an execution on a judgment for the recovery of money is not stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

4. By the statute of 1860, personal property levied on by the Sheriff must be actually seized and sold in *presence of the purchaser*. While a lien attaches to real estate upon the filing of the transcript, and the same is to be sold in front of the Court house door, and all leasehold estates of more than one year are to be so disposed of. *Smith v. Morse*, 2 Cal. 524.

5. A debtor in default has no vested right to have his property sold in a particular way; and third persons, not parties to the contract, have no vested right to purchase the property of a common debtor sold at the instance of another creditor. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

6. The rules of equity proceedings require, in such cases, not only that the property should be sold in parcels, but that property included in a first mortgage should be exhausted before recourse is had to a second, in order that the amount of redemption may be accurately ascertained. *Raun v. Reynolds*, 11 Cal. 14.

7. Where the land sold under execution consisted of separate but adjoining tracts, but the Sheriff and the purchaser were ignorant of the subdivisions, and the defendant failed to inform the Sheriff of the fact, or to direct a sale by parcels: *Held*, that the sale of the land, in gross, was valid. *Smith v. Randall*, 6 Cal. 47.

8. Inadequacy of price, though a fact admissible in evidence to establish fraud, is never of itself sufficient to annul a sale under execution. *Id.*

9. The provision of the statute (2 Rev. Stat. 368, § 38) requiring that in sales of real estate on execution several known lots, tracts or parcels shall be sold separately, is directory merely, and a sale in disregard of it is not void, but only voidable. *Cunningham v. Cassidy, ante*, 183.

§ 224. *If purchaser refuses to pay purchase money, what proceedings.*

If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time, to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion upon previous notice of five days before any Court, or before any Justice of the Peace, if the same shall not exceed his jurisdiction.

J. P.

1. In an action against a purchaser at Sheriff's sale for not paying the amount of his bid, it cannot be set up in defense that no sufficient notice of the sale was given. If such be the fact, the recourse of the purchaser is against the Sheriff. *Harvey v. Fisk*, 9 Cal. 93.

2. The nature and extent of the relief in such case are matters resting very much in the sound discretion of the Court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply; and from such, Courts of Equity seldom relieve. *Goodenow v. Ewer*, 16 Cal. 461.

3. *Held*, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which Courts of Equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Id.*

4. Where a party purchased real estate at an execution sale, upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: *Held*, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 8 Cal. 21.

5. The doctrine of *caveat emptor* applies only to sales made upon valid judgments, and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment, and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 559.

6. A somewhat different rule prevails in cases where particular property is the subject of sale by a specific adjudication, as where the interest of A, in a certain tract, is decreed to be sold. To the validity of a decree of this character the presence of A is essential; and when present, the decree binds him, and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title—it may not, in fact, be of any value, and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Id.*

7. A *mandamus* will not lie to compel a Sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

8. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the Sheriff. *Webster v. Haworth*, 8 Cal. 21.

9. Ordinarily, the maxim of *caveat emptor* applies to judicial sales, but it has many limitations and exceptions. *Id.*

10. This provision of law will be enforced, unless fraud is proven between the officer and the second purchaser. *Harvey v. Fisk*, 9 Cal. 93.

§ 225. *Court or Justice may proceed in a summary manner against a purchaser refusing to pay; officer may refuse such purchaser's bid after.*

Such Court or Justice shall proceed in a summary manner and give judgment and issue execution therefor forthwith; but the defendant may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

J. P.

§ 226. *These two sections not to make officer liable beyond a certain amount.*

The two preceding sections shall not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

J. P.

§ 227. *Personal property not capable of manual delivery, how delivered to purchaser.*

When the purchaser of any personal property capable of manual delivery shall pay the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired, shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title and interest which the debtor had in and to such property on the day the execution was levied.

J. P.

§ 228. *Personal property not capable of manual delivery, how sold and delivered.*

When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title and interest which the debtor had in and to such property on the day the execution was levied.

J. P.

1. The purchaser of a judgment on sale under execution and levy takes as assignee only—assuming that a judgment is the subject of levy and sale. The Sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner. *Fore v. Manlove*, 18 Cal. 436.

2. The word "officer," in the two previous sections, refers to the incumbent at the time of the act of sale; and if he be dead, his successor cannot perform the duty. *People v. Boring*, 8 Cal. 406.

3. How the act is to be done in such a case, discussed and suggested. *Id.*

§ 229. *Real property, when absolute sale or not; in the latter case, what the certificate must contain.*

Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title and interest therein, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases the property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of the sale containing—1st, a particular description of the real property sold; 2d, the price bid for each distinct lot or parcel; 3d, the whole price paid; 4th, when subject to redemption it shall be so stated. A duplicate of which certificate shall be filed with the Recorder of the county.

J. P.

1. *Query*: What is the effect, under our system, of a sale of land under execution to the execution creditor; does it pass any greater title in the premises than that actually held by the defendant in execution? *Eldridge v. See Yup Co.*, 17 Cal. 44.

2. The statutory right of redemption is equally applicable to sales under decrees in mortgage cases, as to sales under ordinary judgments at law. *McMillan v. Richards*, 9 Cal. 365.

3. A description in a Sheriff's return of city lots by numbers, referring to the official city map, is sufficient. *Welch v. Sullivan*, 8 Cal. 165.

4. The decisions as to the estate of the judgment debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under the decree, and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor; and that the conveyance, when executed, will take effect, in the one case,

from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. *McMillan v. Richards*, 9 Cal. 365.

5. Until a consummation of a sale of real property upon execution is made by a conveyance from the Sheriff, the estate remains in the judgment debtor. Until then, the purchaser possesses only a right to an estate which may afterwards be perfected by conveyance. *Cummings v. Coe*, 10 Cal. 529.

6. The title of a purchaser of real estate at Sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 128.

§ 230. *Real property so sold, by whom it may be redeemed.*

Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1st. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2d. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.



§ 228. *Personal property not capable of manual delivery, how sold and delivered.*

When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title and interest which the debtor had in and to such property on the day the execution was levied.

J. P.

1. The purchaser of a judgment on sale under execution and levy takes as assignee only—assuming that a judgment is the subject of levy and sale. The Sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner. *Fore v. Manlove*, 18 Cal. 436.

2. The word "officer," in the two previous sections, refers to the incumbent at the time of the act of sale; and if he be dead, his successor cannot perform the duty. *People v. Boring*, 8 Cal. 406.

3. How the act is to be done in such a case, discussed and suggested. *Id.*

§ 229. *Real property, when absolute sale or not; in the latter case, what the certificate must contain.*

Upon a sale of real property, the purchaser shall be substituted  
all the right title and interest therein, and claim of

*Amendment to Sec. 229.—Passed April 27th, 1863.*

[Took effect on passage.]

§ 229. Upon a sale of real property, the purchaser shall be substituted to and acquire all the right, title, interest, and claim, of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases, the property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of sale, containing:

*First*—A particular description of the real property sold.

*Second*—The price bid for each distinct lot or parcel.

*Third*—The whole price paid.

*Fourth*—When subject to redemption it shall be so stated.

And when the judgment under which the sale has been made is made payable in a specified kind of money or currency, the certificate shall also state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment. A duplicate of such certificate shall be filed by the officer in the office of the Recorder of the county.

from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. *McMillan v. Richards*, 9 Cal. 365.

5. Until a consummation of a sale of real property upon execution is made by a conveyance from the Sheriff, the estate remains in the judgment debtor. Until then, the purchaser possesses only a right to an estate which may afterwards be perfected by conveyance. *Cummings v. Coe*, 10 Cal. 529.

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1st. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2d. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

J. P.

1. **Generally.**—The statute allowing a redemption of property sold at judicial sales contemplates that the possession shall not change to the purchaser until the expiration of the time limited for redemption. *Guy v. Middleton*, 5 Cal. 392.

2. The statute allowing redemption of lands sold under execution is inoperative as to those cases where the debt, upon which judgment and execution was obtained, was contracted before the passage of the act. *Seale v. Mitchell*, 5 Cal. 401.

3. An act denying a right of sale for the enforcement of the contract would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

4. The statutory regulations as to redemption are mere provisions of sale, governing the course of the process and its effects. They do not touch the contract of indebtedness, which stands, as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. And a sale without any right of redemption is a valid and sufficient remedy for the enforcement of the contract. *Id.*

5. The right to redeem under the statute, and the mode of asserting the right, are mere creatures of the statute. The right is given to a judgment creditor, and if before a party becomes a judgment creditor the law be repealed, he has no claim to redeem, because he does not belong to the class of persons for which the remedy is furnished. *Id.*

6. The Legislature may give a particular privilege, or a right, to contract on certain terms or in certain circumstances, but it may repeal the provision, or deny the right, as a general rule, as fully and completely as it can give them; or it may alter the terms at its pleasure, subject only to this: that it cannot repeal or alter so as to affect those contracts which have been made during the existence of the act authorizing them. *Id.*

7. The right to redeem land is no part of the contract of indebtedness. It is a new privilege given by statute. It is a provision made by statute for a future con-

tract, by pursuing which a purchase of land may be made. But as this provision is only a matter out of which rights may grow, the provision may be repealed at any time before a party avails himself of it. *Id.*

8. A redemption of property sold under a decree of foreclosure is accomplished by payment under protest, if the amount claimed to be due by the Sheriff to certain portions claimed are disputed. *Id.*

9. Courts of equity will lean in favor of the right of redemption. *Hickox v. Lowe*, 10 Cal. 207.

10. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Raun v. Reynolds*, 11 Cal. 20.

11. The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact, that they have had their day in Court, and an opportunity of setting up any equities they possessed. After the decree, they stand, as to their right of redemption, in the same position as ordinary judgment debtors. *Montgomery v. Tutt*, 11 Cal. 317.

12. **Who may or may not redeem.**—Under the two hundred and twenty-ninth section of the Practice Act, a subsequent judgment creditor, having a lien, has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. *Kent v. Cahoon & Laffan*, 2 Cal. 595.

13. It follows that a creditor of the mortgagor obtaining a judgment after sale under the decree of foreclosure, but before the execution of the conveyance thereunder, acquires a lien on the estate entitling him to redeem. *McMillan v. Richards*, 9 Cal. 365.

14. Where a mechanic's lien attached on certain premises January 18th, 1856, and a mortgage was placed on the same premises January 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months no redemption being had, a deed was executed to the assignees of the Sheriff's certificate: *Held*, that the right of the mortgagees to redeem the premises, by paying off the incumbrance of the mechanic's lien, was not affected by the decree and the proceedings thereunder, and that the purchasers of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Whitney v. Higgins*, 10 Cal. 547.

15. The right to redeem, under the statute, from a sale on execution, exists in some instances where there is no equity, and in other instances in connection with the equitable right. Parties to the suit in which the judgment is rendered, under which the sale is made, are restricted to the six months given by statute. Parties acquiring interests pending suits to enforce previously existing liens, or after judgment docketed or sale made, have no equity, and are confined to the rights given by the statute; but parties obtaining interests subsequent to the plaintiff and before suit brought, who are made parties in such suit, possess the equitable and statutory right. They may redeem under this statute, or they may file their bill in equity. *Id.*

16. The redemption should be beneficially construed. *Kent v. Laffan*, 2 Cal. 595.

17. The fact that judgments were recovered before the Act of 1859 does not vest in the holders of them the right to redeem from a sale made after the passage of the act, upon any terms different from those prescribed by the act. If the right to redeem under the Act of 1851 were an incident to any judgment rendered while that act existed, it was a portion of the remedy which might be taken away by the Legislature at any time before the right had become vested by the party availing himself of it. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

18. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: *Held*, that plaintiffs did not lose their equitable right of redemption, from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied. *Id.*

19. The doctrine of *Whitney v. Higgins*, (10 Cal. 554) as to equitable right of

redemption in favor of certain persons not made parties to a mortgage foreclosure, applied to a peculiar state of facts. *Id.*

20. Without express authority, neither the Mayor nor the Commissioners of the Funded Debt of San Francisco, nor any or either of them, by virtue of their offices or otherwise, are authorized to redeem, under the Act of April 29th, 1851, lands of the city sold under executions against her; neither can the City Attorney ratify their act of redemption by plea after suit brought. *Thorne v. San Francisco*, 4 Cal. 127.

21. The Commissioners of the Funded Debt are not successors in interest, judgment debtors, or judgment creditors, and therefore not redemptioners, nor are they so in their individual capacity of citizens and tax-payers. *Id.*

22. A payment to the Sheriff for the redemption of land sold under execution cannot be made in certified checks. *Id.*

23. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance to him, he has the same right as successor in interest to the debtor or mortgagor. *McMillan v. Richards*, 9 Cal. 413.

24. Possibly a Court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold in foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *McDermott v. Burke*, 16 Cal. 590.

25. A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time of statutory redemption having expired, B gets a Sheriff's deed: *Held*, that D, as subsequent mortgagee, may redeem A's but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. *Kirkham v. Dupont*, 14 Cal. 563.

26. A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanics' liens by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lienholder. *Gamble v. Wolf*, 15 Cal. 510.

### § 231. *When it may be redeemed, and redemption money.*

[1859, 1860.] The judgment debtor, or redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.

1. Under our statute a redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent. *McMillan v. Vischer*, 14 Cal. 232.

2. When a redemptioner, under the statute, pays to the Sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *Id.*

3. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *Id.*

4. The purchaser at an execution sale, before conveyance to him, has a right to redeem the property sold on the enforcement of a prior lien; after conveyance, he

has the same right as successor in interest to the debtor or mortgagor. *McMillan v. Richards*, 9 Cal. 365.

5. Nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *McMillan v. Vischer*, 14 Cal. 232.

6. A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time for statutory redemption having expired, B gets a Sheriff's deed: *Held*, that D, as subsequent mortgagee, may redeem A's, but not C's, interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. *Kirkham v. Dupont*, 14 Cal. 559.

7. The redemption money for A's interest would be the amount of B's mortgage debt, with interest, etc., less one-half of the purchase money of the whole tract sold, as the land of A and C under the foreclosure sale. *Id.*

8. In such case the Sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *McMillan v. Vischer*, 14 Cal. 232.

9. The legal estate exists in the judgment debtor after expiration of the time to redeem, until execution of the conveyance to the purchaser. *McMillan v. Richards*, 9 Cal. 365.

10. The title to real estate does not pass until the execution and delivery of the deed. *Anthony v. Vessel*, 9 Cal. 103.

11. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. *Harris v. Reynolds*, 13 Cal. 517.

12. Where a redemptioner, under the statute, pays to the Sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 240.

13. Under our statute a redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent., nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *Id.*

14. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Raun v. Reynolds*, 11 Cal. 14.

15. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *McMillan v. Vischer*, 14 Cal. 240.

16. **Who may or not object to the redemption.**—Where a party purchased property at Sheriff's sale, and on attempt by the owner to redeem from him he objects that the amount tendered for redemption is not enough, because not including certain taxes he has paid on the property: *Held*, that he must show that the taxes were legally assessed and paid, and were a charge on the property before or at the time of the redemption, and the Tax Collector's receipts are not sufficient proof. *Seale v. Doane*, 17 Cal. 476.

17. Third persons have no right to inquire from what source a redemptioner gets the money he proposes to use to effect a redemption he is entitled to make. *Id.*

§ 232. *When judgment debtor, or other redemptioner, may redeem.\**

[1859, 1860.] If property be so redeemed by a redemptioner,

\* STATUTES OF 1858, 95.

*An Act for the relief of Purchasers at Sales of Real Estate by Public Officers. Approved, March 27th, 1858.*

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Where lands have been or may be hereafter sold by a Sheriff, or other author-

either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption with four per cent. thereon in addition, and the amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; provided, that the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the said last redemptioner previous to his own, with interest. Notice of redemption shall be given to the Sheriff. If no redemption be made within six months after the sale, the purchaser, or his assignee, shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner, or his assignee, shall be entitled to a Sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated and he be restored to his estate.

J. P. See *ante*, § 231.

1. A Sheriff who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Anthony v. Wessel*, 9 Cal. 103.

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ized officer, for taxes, or under an execution or order of sale, and the purchaser or his assigns may be entitled to a deed, and the Sheriff, or other officer who made the sale, is dead or absent from the State, or in anywise disqualified, it shall or may be lawful for the successor of the said Sheriff, or other officer, to make such deed to such purchaser, his assignee or assignees, in the same manner and with the same effect as if made by the officer making such sale.

SEC. 2. When property has heretofore been sold by a Sheriff, or other authorized officer, for taxes, or under an execution or order of sale, and in consequence of the death, absence from the State, or other disqualification of the Sheriff, or other officer who made the sale, a deed for the property so sold has been executed to the purchaser or purchasers, or to his or their assigns, by the successor of such Sheriff, or other officer, such deed so made, as aforesaid, by the successor of the officer who made the sale, is hereby ratified and confirmed, and made as valid and binding, to convey the property, as though the same had been executed by the officer himself who made the sale; and such deed, so made, and executed, and acknowledged, according to law, and heretofore recorded, shall impart notice of its contents from and after the date of the passage of this act.

SEC. 3. Such deeds, so made as aforesaid, shall have the same force and effect as evidence as if made by the officer making such sale.

2. A purchaser at a Sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest the lien. He may be both a creditor and a purchaser, and still have a prior lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment debtor, until the delivery of the Sheriff's deed. *Knight v. Fair*, 9 Cal. 117.

3. The Redemption Act of 1859 is in substitution of the Act of 1851, and applies to sales made after the passage of the Act of 1859, though made upon judgments rendered before. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515.

4. The payment by a judgment debtor of the judgment, after a Sheriff's sale, extinguishes the lien, and the fact that he takes a transfer of the certificate and the Sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarthy v. Christie*, 13 Cal. 81.

5. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: *Held*, that plaintiffs did not lose their equitable right of redemption, from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 522.

6. A Sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the Sheriff. If executed in his own name, it is decisive against the party claiming under it. *Lewis v. Thompson*, 3 Cal. 266.

7. A *mandamus* will not lie against a Sheriff to compel him to make a deed to land to a purchaser at execution sale who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money, especially when there is an unsettled contest as to the question of lien. *Williams v. Smith*, 6 Cal. 91.

8. Where a Sheriff's deed is executed by a deputy, in the name of the Sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read in evidence in an action of ejectment. *Cloud v. El Dorado County*, 12 Cal. 128.

§ 233. *In cases of redemption; to whom the payments are to be made.*

The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale; and a tender of the money shall be equivalent to payment.

J. P.

1. Where a redemptioner, under the statute, pays to the Sheriff an excess of money under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 232.

2. In such case the Sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *Id.*

3. A payment to the Sheriff for the redemption of land sold under execution cannot be made in certified checks. *People v. Hays*, 4 Cal. 127.

4. The "officer who made the sale," refers to the incumbent at the time of the acts of sale, and not to the official character of the person, and if he be dead, his successor cannot perform the duty—i. e. receive the redemption money. *People v. Boring*, 8 Cal. 406; *Anthony v. Wessel*, 9 Id. 103.

5. How redemption money in such cases is to be paid discussed. *Id.*

6. The title to redeem does not arise from the existence of the facts mentioned in the statute, but it is a statutory right, given only in the event of a tender and production of certain statutory proofs. The redemptioner must produce a copy of the docket of the judgment. *Haskell v. Manlove*, 14 Cal. 54.

§ 234. *What must a redemptioner do in order to redeem.*

A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the Sheriff:

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the Clerk of the Court, or of the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder.

2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; and

3d. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

1. If a party claim a Sheriff's deed, as having redeemed property as successor in interest of the judgment debtor, his offer to redeem must have been made in that character. *Haskell v. Manlove*, 14 Cal. 54.

2. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Id.*

3. A certificate of the Sheriff of the purchase of property as that of the defendant in execution is not sufficient to enable the redemptioner to redeem.

For the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood



2. A purchaser at a Sheriff's sale may have a lien upon the property prior to that of the redemptioner. The fact that he is the creditor does not divest the lien. He may be both a creditor and a purchaser, and still have a prior lien to that of the redemptioner. This can only be on the principle that the legal estate is still in the judgment debtor, until the delivery of the Sheriff's deed. *Knight v. Fair*, 9 Cal. 117.

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5. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: *Held*, that plaintiffs did not lose their equitable right of redemption, from the fact that they also asserted their statutory right, the subsequent redemption by D. leaving their claims unsatisfied. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 522.

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7. A *mandamus* will not lie against a Sheriff to compel him to make a deed to land to a purchaser at execution sale who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money, especially when there is an unsettled contest as to the question of lien. *Williams v. Smith*, 6 Cal. 91.

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### *Amendment to Sec. 233.—Passed April 27th, 1863.*

[Took effect on passage.]

§ 233. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, said payments shall be made in the same kind of money or currency, and a tender of the money shall be equivalent to payment.

4. The "officer who made the sale," refers to the incumbent at the time of the acts of sale, and not to the official character of the person, and if he be dead, his successor cannot perform the duty—i. e. receive the redemption money. *People v. Boring*, 8 Cal. 406; *Anthony v. Wessel*, 9 Id. 103.

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2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; and

3d. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

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2. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Id.*

3. A certificate of the Sheriff of the purchase of property as that of the defendant in execution is not sufficient to enable the holder to redeem as such successor; at least, not until the expiration of the six months. *Id.*

4. An assignee of a judgment and of the Sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed; and the sale will be set aside and the property restored to the defendant, where no loss or injury will be done the assignee. *Reynolds v. Harris*, 14 Cal. 667.

5. Otherwise, as to a stranger, a *bona fide* purchaser without notice. He is not within the rule. But to constitute himself such a purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a Sheriff's deed. *Id.*

§ 235. *Until the expiration of redemption time, Court may restrain waste on the property; what shall be considered waste.*

Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood

or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

J. P.

§ 236. *Rents and profits, who is to receive.*

The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof.

J. P.

1. The purchaser at Sheriff's sale of a "water ditch," is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris v. Reynolds*, 13 Cal. 514.

2. The words "tenant in possession," in section two hundred and thirty-six of the Practice Act, embrace the judgment debtor, as well as his lessee. *Id.*

3. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser, under the mortgage sale, can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 592.

4. A party in possession of premises under Sheriff's sale, and receiving rents and profits during the time for redemption, should, in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey v. Abbott*, 13 Cal. 609.

5. If, in such case, such party fails to pay the tax, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession, under the Sheriff's sale, was by both partners. The duty to pay the tax was several as well as joint. *Id.*

6. A purchaser of land at Sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 43.

7. The sale operates as an assignment of the lease for the time. *Id.*

8. As to whether the words "tenant in possession" would include the judgment debtor, in a case where he was in possession at the time of the sale, so as to make him responsible for use and occupation—*query?* *Id.*

9. At a Sheriff's sale of the premises on a foreclosure suit by plaintiff against R., plaintiff became the purchaser. During the six months succeeding the sale, C., acting as agent of defendants, occupied the premises, carrying on the business of a saloon. At the end of the six months, defendants, as mortgagees, redeemed: *Held*, that the defendants are tenants in possession within the two hundred and thirty-sixth section of the Practice Act, and must pay the plaintiff for use and occupation for the six months. *Knight v. Truett*, 18 Cal. 113.

10. A judgment debtor who redeemed his property within twenty-one days after the Sheriff's sale, but who had received from his tenants in possession four hundred and forty-five dollars rent between the day of sale and the redemption: *Held*, liable to the purchaser at the sale for the amount so received. *Klinn v. Chase*, 17 Cal. 596.

11. The section of the act allowing to the purchaser the value of the use and occupation affords the only remedy the purchaser is entitled to. *Guy v. Middleton*, 5 Cal. 392.

§ 237. *If purchaser of real property be evicted for irregularities in the sale, what he may recover and from whom. When judgment to be revived. Petition for the purpose how and by whom made.*

[1860.] If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at Sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the Court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon, from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said Court of that date, and bearing interest as aforesaid, and any other or after-acquired property, rents, issues or profits of the said debtor, shall be liable to levy and sale under execution in satisfaction of such debt; provided, that no property of such debtor sold *bona fide* before the filing of such petition shall be subject to the lien of said judgment; and provided further, that notice of the filing of such petition shall be made by filing a notice thereof in the Recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest.

J. P.

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## CHAPTER II.—*Proceedings supplementary to execution.*

SEC. 238. *When execution returned unsatisfied, judgment creditor may compel judgment debtor to appear before a Judge and answer concerning his property; debtor not to go out of his county.*

239. *Proceedings to compel debtor to appear; in what cases he may be arrested; what bail may be given.*

- 240. *Any debtor of the judgment debtor may pay the latter's creditor.*
- 241. *Examination of debtors of judgment debtor, or of those having property belonging to him.*
- 242. *Witness required to testify.*
- 243. *Judge may order property to be applied on execution.*
- 244. *Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*
- 245. *Disobedience of order, how punished.*

§ 238. *When execution returned unsatisfied, judgment creditor may compel judgment debtor to appear before a Judge and answer concerning his property; debtor not to go out of the county.*

When an execution against property of the judgment debtor, or of any of several debtors in the same judgment, issued to the Sheriff of the county where he resides—or if he does not reside in this State, to the Sheriff of the county where the judgment roll is filed—is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from the Judge of the Court or a County Judge, requiring such judgment debtor to appear and answer concerning his property, before such Judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor shall be required to attend before a Judge or referee out of the county in which he resides, when proceedings are taken under the provisions of this chapter.

N. Y. Code, § 292. J. P.

1. Edwards on Referees, 158, *et seq.*; and Edwards on Receivers in Equity, 366, *et seq.*

2. These proceedings are a substitute for a creditor's bill in the old practice. *Adams v. Hackett*, 7 Cal. 187.

3. The fact that a referee in the proceedings supplementary to execution was the clerk of the attaching creditor is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Id.*

4. As soon as proceedings supplementary to execution were instituted before the District Court, it obtained jurisdiction over the case, and had authority to proceed and apply the property of the judgment debtor to the satisfaction of the judgment of the plaintiffs. *Id.*

5. The obvious purpose of the provisions of the Code, respecting supplementary proceedings, (§§ 294–299) is to give the creditor an immediate and summary remedy against the debtor's property; but not to permit the rights of third parties to be brought into litigation, except in a regular way, by suit. (*Goodyear v. Betts*, 7 How. Pr. R. 187; *The People v. King*, 9 Id. 97, 100; *Gasper v. Bennett*, 12 Id. 307.) To sustain an order that he apply property in his possession to the judgment, it is not enough that he has it in possession. It must appear to be his property.

If the contrary appears, the remedy to test the title is, for the receiver to bring action for the property. *Rodman v. Henry*, 17 N. Y. (3 E. P. Smith's) R. 482.

6. Before the supplementary proceedings can be instituted, the creditor's remedy by execution must be really exhausted. *Nagle v. James*, 7 Abb. Pr. 234.

7. Where the Sheriff makes return of an execution before the expiration of the sixty days, at the request of the plaintiff or his attorney, such return is to be regarded as the act of the party, and not the official act of the Sheriff, and supplementary proceedings founded upon such a return will be set aside, on application of the judgment debtor. *Spencer v. Cayler*, 9 Abb. Pr. 382.

8. But where the return is made by the officer of his own motion, and in good faith, it is no objection that it was made within the sixty days. *Farquaharson v. Kimball*, 9 Abb. Pr. 385, note.

9. The fact that a second execution, which has been issued since the return of that on which the proceedings are founded, has not been returned, does not affect the proceedings. *Id.*

10. The proceedings taken on the return of the first execution are not superceded by an insufficient levy under the second. *Id.*

§ 239. *Proceedings to compel debtor to appear; in what cases he may be arrested; what bail may be given.*

[1854.] After the issuing an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the Court or of a Judge thereof, or County Judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such Court or Judge may, by an order, require the judgment debtor to appear at a specified time and place before such Judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the Judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the Sheriff to arrest the debtor and bring him before such Judge. Upon being brought before the Judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the Judge or referee, as shall be directed, during the pendency of proceedings, and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

See N. Y. Code, § 292. J. P.

1. A commitment for contempt, for refusing to obey an order of Court commanding the imprisonment of the party in contempt, until he shall comply with the

order, should set forth that it is in the power of the party to comply. *Ex parte Cohen*, 6 Cal. 318.

2. An order committing a party for contempt, and ordering that he be imprisoned until he comply with a previous order commanding him to pay into Court a certain sum of money, is an excess of jurisdiction, and void, where the party had made affidavit, which was uncontradicted, that the money had passed from his possession and control before the proceedings in contempt were commenced. *Adams v. Haskell*, 6 Cal. 216.

3. A judgment is not property, within the meaning of the Practice Act. *Adams v. Hackett*, 7 Cal. 187.

4. Where the plaintiff proceeded, under section two hundred and thirty-nine of the Practice Act, to examine his judgment debtor as to a judgment held by him against A., and after examination, obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding. *Id.*

5. Though Courts are exclusive judges of their own contempts, still, a party cannot be imprisoned for neglecting or refusing to do what it appears it is out of his power to perform. *Adams v. Haskell*, 6 Cal. 316.

6. The right to the examination under the Code is, like the right to discovery under a creditor's action under the Revised Statutes, unqualifiedly given wherever an execution has been returned unsatisfied in whole or in part. *Owen v. Dupagnac*, 9 Abb. Pr. 180.

7. The rules settled in reference to proceedings under creditor's bills may be regarded as controlling the practice in supplementary proceedings, when not altered by the Code or the practice under it. *Id.*

8. It appeared by the affidavit upon which the order for the examination of the defendant was founded, and the fact was recited in the order, that about fifteen years previously an execution had been issued upon the judgment, and had been returned wholly unsatisfied; and that an *alias* execution, issued shortly before the making of the affidavit, had not been returned: *Held*, that the affidavit was sufficient, and that the judgment creditor was entitled to the order for the examination of the defendant. *Id.*

9. In supplementaty proceedings against judgment debtors, an order was made forbidding them to dispose of their property. On the day fixed by the order for their appearance for their examination, they appeared at the office of the Judge, and after waiting some time, the office being unoccupied, went away. Within an hour after the appointed time, the Judge appeared at his office, and the plaintiff also appeared, and, in the absence of the defendants, took an order appointing the referee, and continuing the injunction. In conformity with this order, the defendants appeared and submitted to an examination: *Held*, 1. That the original injunction had not become revoked nor inoperative, nor had the proceedings been suspended by the circumstances; and if they were, it was waived by the subsequent appearance of the defendants. 2. That the act of the defendants in paying over money subsequent to their attendance at the office of the Judge was a contempt. *Reynolds v. McElhone*, 20 How. Pr. 454.

10. It seems, that the provisions of the Code for proceedings supplementary to execution are limited to reaching property of the debtor, whether in his possession or in the possession of others for him, and which is conceded to be his; also money due to the debtor when the order is obtained and served. But when property or money appears to belong to him, but is in the hands of others, who make claim thereto, it should be reached through a receiver. *Stewart v. Foster*, 1 Hilt. 505.

11. Examinations on supplementary proceedings to a judgment can only be extended to the discovery of the property in the possession or control of the defendant, which he can deliver over. If the property is in the possession of another claiming title, no matter how fraudulent the transfer, no order can be made to compel him to deliver, and therefore no questions can be put to the debtor or witness to discover or prove the fraud. *Town v. Safeguard Ins. Co.*, 4 Bosw. 683.

12. A judgment creditor, by commencing supplementary proceedings against the judgment debtor under section two hundred and ninety-two of the Code, and obtaining an order for the examination of the debtor, does not acquire a prior right to or lien upon the equitable assets of the debtor.—Pratt, J., dissented.

13. In supplementary proceedings, the Judge at chambers, before whom the order is returned, may vacate it, on motion of the summoned party, if the affidavit

on which it is founded is insufficient, or if for any reason it appears to have been improvidently granted. *Courtois v. Harrison*, 1 Hilt. 109.

14. It is not necessary that the affidavit, on which the order for the examination in supplementary proceedings is founded, should be served with the order. *Utica City Bank v. Buell*, 9 Abb. Pr. 385, note.

15. A Judge should not, on supplementary proceedings, by a summary order, require trustees, who hold a trust fund of the debtor, to apply future income accruing therefrom to the payment of the judgment. *Stewart v. Foster*, 1 Hilt. 505.

16. Of the facts requisite to be stated in the affidavit. *Owen v. Dupagnac*, 9 Abb. Pr. 180.

§ 240. *Any debtor of the judgment debtor may pay the latter's creditor.*

After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the Sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the Sheriff's receipt shall be a sufficient discharge for the amount so paid.

See N. Y. Code, § 293. J. P.

§ 241. *Examination of debtors of judgment debtor, or of those having property belonging to him.*

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the Judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the Judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

See N. Y. Code, § 294. J. P.

1. Proceedings supplementary to execution, under section two hundred and ninety-four of the Code, may be taken to compel the treasurer of a joint stock association to submit to an examination, upon the allegation that he is indebted to it, though the judgment is entered against him as treasurer of such association, and the action was commenced by the service of summons upon him under the Act of 1849. *Courtois v. Harrison*, 1 Hilt.

2. An order in supplementary proceedings, directing that the defendant should "pay over to plaintiff's attorney the sum of eighteen dollars, being money that he has paid out and disposed of since the order made by me on the twenty-eighth day of April, restraining him from disposing of his said property, was duly served on him, and while the said order remained in full force and unrevoked, and that in default of payment of the said money as aforesaid, the said M. be committed to the common jail," etc.: *Held*, to show substantially a contempt, and the infliction of a fine, and sufficient to justify defendant's imprisonment. *Reynolds v. McElhone*, 20 How. Pr. 454.

3. After a receiver of defendant's property had been appointed, in proceedings supplementary to execution against the defendant, instituted by plaintiff, the



defendant's household furniture was destroyed by fire—the furniture was such as is exempt from execution, and therefore was not reached by the supplementary proceedings, but it was insured at the time of the fire: *Held*, that the claim for the insurance moneys was subsequently acquired property, which did not pass to and could not be enforced by the receiver. *Sands v. Roberts*, 8 Abb. Pr. 343.

4. Public moneys raised by a municipal corporation pursuant to law—*e. g.*, by tax—for purposes of government, and in the hands of its fiscal officer, are not the property of the corporation, or a debt due to it, within the meaning of section two hundred and ninety-four of the Code, so as to entitle a judgment creditor of the corporation to an order requiring the officer to pay over the moneys in satisfaction of the judgment. *Louber v. The Mayor, etc., of N. Y.*, 7 Abb. Pr. 248.

5. A judgment against a foreign corporation may be enforced by supplementary proceedings, under section two hundred and ninety-four of the Code, to reach property belonging to it in the hands of third parties, or debts due to it from third parties. *McBride v. The Farmers' Savings Bank*, 7 Abb. Pr. 347.

6. Form of affidavit and order in supplementary proceedings against third parties under section two hundred and ninety-four of the Code. *Seeley v. Garrison*, 10 Abb. Pr. 460.

7. The orders allowed to be made in supplementary proceedings—directing the application of property and money to the payment of a judgment, and to punish for contempt (Code, §§ 297, 302)—are entirely discretionary; and an order denying an application for them is not appealable. *Joyce v. Holbrook*, 7 Abb. Pr. 338.

8. In order to put the debtor in contempt for interfering with his property after the order, it must be affirmatively shown that the property in question was acquired prior to the granting of the order. The order does not affect after-acquired property. (8 Paige, 568; 2 Barb. Ch. Pr. 153; 13 Id. 335;) *Potter v. Low*, 16 How. Pr. R. 549.

9. The wife cannot be examined, under section two hundred and ninety-four of the Code, in supplementary proceedings against her husband. *Andrews v. Nelson*, 7 Abb. Pr. 3, note.

10. It seems, that the proper construction of section two hundred and ninety-four would apply to the case of a judgment against any corporation. *McBride v. The Farmers' Savings Bank*, 7 Abb. Pr. 347.

11. It seems, that proceedings under that section may be taken against a corporation. *Courtois v. Harrison*, 1 Hilt. 109.

### § 242. *Witness required to testify.*

Witnesses may be required to appear and testify before the Judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

See N. Y. Code, § 295. J. P.

### § 243. *Judge may order property to be applied on execution.*

The Judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except, that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the use of a family supported wholly or partly by his labor.

See N. Y. Code, § 297. J. P.

See *Adams v. Hackett*, (7 Cal. 202) as to the form of the order in that case.

§ 244. *Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*

If it appear that a person or corporation, alleged to have property of the judgment debtor or indebted to him, claims an interest in the property adverse to him, or denies the debt, the Court or Judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the Court or Judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the Judge granting the same, or the Court in which the action is brought, at any time, upon such terms as may be just.

See N. Y. Code, § 299. J. P.

§ 245. *Disobedience of orders, how punished.*

If any person, party or witness, disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the Court or Judge ordering the reference, for a contempt.

See N. Y. Code, § 302. J. P.

1. It is contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another Court. *Page v. Randall*, 6 Cal. 32.

## TITLE VIII.

### ACTIONS IN PARTICULAR CASES.

#### CHAPTER I.—*Actions for the foreclosure of mortgages.*

##### SEC. 246. *Proceedings in foreclosure suits.*

Sec. 246. There shall be but one action for the recovery of any debt or the enforcement of any claim secured by mortgage upon real, or personal property, which action shall be in accordance with the provisions of this chapter: In actions for the foreclosure of mortgages the Court shall have power, by its judgment, to direct a sale of encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the Court and expenses of the sale, and the amount due to the plaintiff; and if it appear from the Sheriff's return that the proceeds are insufficient, or if a balance still remains due, judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor as in other cases on which execution may be issued. No person holding a conveyance from the mortgagor of the property mortgaged, or who holds a lien thereon, which conveyance or lien does not appear of record in the Recorder's office at the time of the commencement of the action, need be a party to such action, and the judgment or decree therein rendered, and the proceedings therein had, shall be as conclusive against the party holding such unrecorded conveyance as if he had been made a party to such action.

*deposited in Court. but secured falls due at different*

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or lien, upon real estate or personal property, which action shall be in accordance with the provisions of this chapter. In such action, the Court shall have power, by its decree or judgment, to direct a sale of the encumbered property, (or such part thereof as shall be necessary) and the application of the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. If it shall appear from the Sheriff's return that there is a deficiency of such proceeds, and a balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the Clerk of the Court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor.\*

1. **What constitutes a mortgage.**—No particular form of words is necessary to constitute a mortgage; and where two instruments taken together described the property, and the amount of indebtedness, and conveyed the premises as security for the indebtedness: *Held*, to be a sufficient mortgage. *Woodworth v. Guzman*, 1 Cal. 203.

2. The words, "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient. *De Leon v. Higuera*, 15 Cal. 483.

3. A deed and defeasance, to constitute a mortgage, must be between the same parties. *Low v. Henry*, 9 Cal. 538.

4. In mortgages there exist the right to foreclose, after condition broken, and the right of redemption from forfeiture. These two rights are mutual and reciprocal. When one cannot be enforced, the existence of the other is denied; and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. *Koch v. Briggs*, 14 Cal. 256.

5. Where plaintiff leased a lot to B. for ten years, at a monthly rent, payable monthly—at the end of the term, B. to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained this clause: "And it is further agreed, etc., that the brick house now being built, etc., shall always be and remain, as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" *Held*, that it was a mortgage; and that it might be foreclosed on the nonpayment of the first or any month's rent. *Barroillet v. Battelle*, 7 Cal. 450.

6. A conveyance and an attendant agreement for a reconveyance upon the pay-

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\* Statute of 1880, page 284, § 48.

SEC. 48. Whenever any action shall be brought for the foreclosure of any mortgage or lien, mentioned in section forty-seven of this act, a similar affidavit to that mentioned in said section shall be attached to the complaint in such action: and in case the same shall not be attached at the commencement of the said action, the Court in which the suit is pending, on motion of the defendant therein, shall make an order staying all proceedings in such action, until such an affidavit shall have been filed, or proof made of the payment of such taxes; and it shall be the duty of the Court, before entering a decree or judgment in any such case, to require such affidavit or proof.

The mortgages and liens referred to in the foregoing section include all others than mortgages given to secure the purchase money of the property mortgaged.

The oath referred to is as follows: "I, A. B., do solemnly swear, that all taxes for State and county purposes, assessed on the ——— or debt secured by this mortgage, (or lien, as the case may be) have been paid.

This act is not applicable to the city and county of San Francisco.

ment of the amount of the consideration and interest, do not of themselves, in the absence of other circumstances, create a mortgage, but only a defeasible purchase, which should be narrowly watched lest it may be made the means of converting what was in fact intended as security into an absolute purchase. *Hickox v. Lowe*, 10 Cal. 197.

7. Whether a conveyance, absolute in form, executed in consideration of a precedent debt on the part of the grantor to the grantee, and an agreement executed at the same time by the grantee to reconvey the premises to the grantor upon payment of the consideration, with interest and expenses, taken together constitute a mortgage or a conditional sale, depends upon the fact whether the debt was discharged by the conveyance or subsisted afterwards. *Id.*

8. The only difficulty which arises, where there is an absolute conveyance with an attendant agreement to reconvey, is to ascertain the fact whether the debt subsists or has been extinguished; and where there is no doubt on this point, Courts of Equity lean in favor of the right of redemption, and construe instruments as constituting a mortgage rather than a conditional sale. *Id.*

9. A provision in an agreement for a reconveyance, upon the payment of the precise amount of the consideration and a stipulated monthly interest thereon, is a circumstance favoring the conclusion that the debt subsisted. *Id.*

10. It is not necessary, to constitute a mortgage, that it should appear upon the face of the papers that there was any personal obligation on the part of the mortgagor to pay the amount of the principal and interest. Such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. *Id.*

11. Slight circumstances will determine the transaction to be one mortgage, when that can be done without violence to the understanding of the parties. *Id.*

12. A deed of land from A. to F., reciting the consideration at one hundred dollars, and a contract from F., not under seal, not acknowledged or recorded, agreeing to reconvey the land to A. upon payment within a given time of \$8,600, with interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time. This contract contained a provision that it should be treated only as a contract to convey, and not as an acknowledgment that the deed was intended as a mortgage. The real consideration of the deed was a preëxisting indebtedness of \$8,600 due from A. to F.: *Held*, that this deed is not in effect a mortgage; that the question is one of intention to be gathered from the whole transaction; that although the consideration of the deed was an antecedent debt, yet the legal inference is that the debt was discharged upon the execution of the deed, and the provision in the contract to reconvey, as to not treating the deed as a mortgage, confirms this inference; and it was competent for the parties to insert such a provision. *People ex rel. Ford v. Irwin*, 18 Cal. 117.

13. **Mortgage, who may make.**—The property of the wife may be mortgaged, by joint deed of herself and husband, for the debt of the husband. *De Leon v. Higuera*, 15 Cal. 483.

14. The wife cannot mortgage her separate real estate, unless her husband unites in the conveyance in the mode prescribed by our statute—at least, as to property acquired after the passage of the statutes; and these statutes, when operating in futuro, are constitutional. *Harrison v. Brown*, 16 Cal. 287.

15. But the fact that the husband abandons his wife, or suffers her to act as a *femme sole* and take care of herself, does not give her a right to mortgage either his or her separate property, whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. *Id.*

16. The Act of February 14th, 1855, (Wood's Dig. 490) makes an exception in case the husband be not, and for one year next preceding the execution of the conveyance of the wife has not been, *bona fide* residing in this State. *Id.*

17. The trustee of a naked trust has no power to mortgage the trust estate. *Griffin v. Blanchard*, 17 Cal. 70.

18. A corporation may bind itself by a note and mortgage, made by its president and secretary, and signed by them in their official capacity as such. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

19. A mortgage of the homestead of the family, executed by the husband only,

is void. To make such a mortgage valid, the wife should join with the husband in the execution of it. *Lies v. De Diablar*, 12 Cal. 327.

20. Where husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer v. Riehn*, 13 Cal. 643.

21. A married woman cannot make an assignment of a mortgage, without the concurrence of the husband. [The property was common.—*REP.*] *Tryson v. Sutton*, 13 Cal. 490.

22. A married woman has no power to execute a mortgage to secure the payment of a promissory note, given by her as a *femme covert*. *Simpers v. Sloan*, 5 Cal. 458.

23. **Nature of mortgage securities, and their relation to the debt secured.**—The original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side, and security for its repayment furnished on the other. They pass no estate in the lands, but are mere securities; and default in the payment of the money secured does not change their character. *McMillan v. Richards*, 9 Cal. 365.

24. The settled doctrine of equity now is, that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or incumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage. *Id.*; *Nagle v. Macy*, *Id.* 426; *Goodenow v. Ever*, 16 *Id.* 461.

25. A mortgage does not vest in the mortgagee any estate in the land, either before or after condition broken. Payment after default operates to discharge the lien equally with payment at the maturity of the debt. *Johnson v. Sherman*, 15 Cal. 287; *Godfrey v. Caldwell*, 2 *Id.* 489.

26. The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. *McMillan v. Richards*, 9 Cal. 365.

27. Where property is mortgaged to secure two notes, falling due at different periods, and the mortgage is foreclosed by suit upon the note first falling due, and then, after the period for redemption has passed, but before the Sheriff has executed his deed to the purchaser, this first note, or rather the judgment thereon, is paid: *Held*, that the payment of this note effected the redemption of the property, and left it subject to the mortgage to secure the second note. *Hocker v. Reas*, 18 Cal. 650.

28. A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage. *Perre v. Castro*, 14 Cal. 519.

29. The debt and mortgage are inseparable. The latter must follow the former. As distinct from the debt, the mortgage has no determinate value, and is not a subject of transfer. *Nagle v. Macy*, 9 Cal. 426.

30. The character of a mortgage, as security, is in no way affected by the fact that judgment for the debt has been obtained. *Id.*

31. If a mortgage at the beginning, the instrument always remains a mortgage. *Lee v. Evans*, 8 Cal. 424.

32. The indorsement and delivery of one of two notes secured by a mortgage, carries with it a *pro rata* portion of the security. *Phelan v. Olney*, 6 Cal. 478.

33. When the holder of the second note and assignee of the mortgage entered a discharge of the mortgage and took a new security, the discharge was valid as to him, and divested his lien under the mortgage, though void as to the holder of the first note. *Id.*

34. Where a new note, on the same terms, between the same parties, for the same sum, and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring v. Hill*, 6 Cal. 17.

35. R., an unmarried man, executed two mortgages upon a lot of land. Subsequently, he marries, and then executes a new mortgage to persons who pay off

the first mortgages, upon their being released. The release of the old, and the execution of the new mortgage, were on the same day. The wife did not sign the new mortgage: *Held*, that, in equity, the transaction is an assignment of the first mortgages in consideration of the money advanced by the second mortgagees; not the creation of a new incumbrance, but changing the form of the old. *Swift v. Kraemer*, 13 Cal. 526.

36. Where a judgment is rendered against A and his sureties, and A and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property; subsequent to which, an execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released: *Held*, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied. *People v. Chisholm*, 8 Cal. 29.

37. Cases cited as to whether and when payment of money due on a mortgage operates as a discharge or an assignment of the mortgage. *Guy v. Du Uprey*, 16 Cal. 135.

38. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one, to whom the other had meanwhile sold, the new mortgage being for a less sum, by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a Court of Equity to interfere, and give the mortgage priority over intervening liens. *Dingman v. Randall*, 13 Cal. 512.

39. He who has the right to the note has undoubtedly the right to foreclose the mortgage, though not made to himself. *Ord v. McKee*, 5 Cal. 516.

**40. Notice and priority.**—The object of laws which require deeds and mortgages to be recorded is to prevent imposition upon subsequent purchasers and mortgagees, in good faith, and without notice of the prior deed or incumbrance; but not to protect them when they have such notice.—Per Bennett, J. *Woodworth v. Guzman*, 1 Cal. 203.

41. A party holding under an assignment of a recorded lease, containing a mortgage clause, is bound to know the contents thereof, and is, therefore, subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Barroilhet v. Battelle*, 7 Cal. 450.

42. A prior unrecorded mortgage has priority of lien over a subsequent recorded mortgage, where the second mortgagee had notice of the existence of the first incumbrance; and this was so, as well before as since the enactment of the statute by which the common law was adopted in California. *Woodworth v. Guzman*, 1 Cal. 203.

43. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, cannot object to defects in the registry thereof. *De Leon v. Higuera*, 15 Cal. 483.

44. A mortgage made anterior to the passage of the act concerning conveyances was not recorded in accordance with the provisions of the forty-first section of said act: *Held*, that it lost its priority as against a subsequent purchaser without notice. *Lick v. O'Donnell*, 3 Cal. 39.

45. An unrecorded mortgage has priority over a mechanic's lien, which attached subsequently to the execution of the mortgage. *Rose v. Munie*, 4 Cal. 173.

46. Where A mortgaged a lot of land for five hundred dollars, and afterwards conveyed the same to B, a *femme sole*, in trust for her children, and A then married B, and the two together borrowed an additional sum, and executed a joint mortgage for the whole amount to the assignee of the first mortgage, and the note for the first debt was surrendered, though the mortgage was not canceled; and the debt was again increased, and the last mortgage canceled, and a new one for the increased amount executed by A and B: *Held*, that the holder of the last note and mortgage was entitled to a judgment thereon, and to a decree of foreclosure and sale, for the amount of the first note and mortgage. *Birrell v. Schie*, 9 Cal. 104.

**47. Mortgagee in possession, rights of.**—Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his interest, nor convert that which was previously a security into a seizin of the freehold. *Nagle v. Macy*, 9 Cal. 426.

48. If the mortgage confers no right of possession, entry under it can give none. It does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the parties exactly as they stood previous to such possession. *Id.*

49. A mortgagee in possession is not entitled to make any charge by way of compensation for his trouble in managing the property and collecting and receiving the rents. *Benham v. Rowe*, 2 Cal. 387.

50. It is the duty of a mortgagee in possession to exercise the same care and supervision over the property as a prudent man would over his own. And if such mortgagee act in bad faith toward the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Id.*

51. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes, by operation of law, trustee of the surplus for the mortgagor. *Pierce v. Robinson*, 13 Cal. 116.

52. A stipulation that a party should be protected for his advance of money, to be expended in building upon a mortgaged lot, by the mortgagee, is a promise to repay the money, so expended, out of the mortgaged premises; and such contract is obligatory upon an assignee of the mortgage with notice. *Godeffroy v. Caldwell*, 2 Cal. 489.

53. **Foreclosure a proceeding in equity.**—A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a District Court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief; and for this purpose, to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and Probate Court, and allowed, it is otherwise. *Belloc v. Rogers*, 9 Cal. 123.

54. Adverse titles to the premises held by parties claiming by conveyance from the mortgagor prior to the mortgage, or from third parties prior or subsequent to the mortgage, are not the proper subjects of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco v. Lawton*, 18 Cal. 465.

55. The nature of the mortgagor's right to redeem, and of the mortgagee's right to foreclose, stated. *Goodenow v. Ever*, 16 Cal. 461.

56. Where the plaintiff, being the owner of an undivided one-half of a tract of land, mortgaged his interest therein to A, and subsequently, with his cotenant, conveyed the land to B and C—two-thirds to one, and one-third to the other—by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due, the plaintiff filed his bill against B and C, to compel a foreclosure and payment: *Held*, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action. *Abel v. Coons*, 7 Cal. 105.

57. When a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up, as a full defense, a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 609.

58. **Receiver of rents, etc., will not be appointed pending suit.**—In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 Cal. 99.

59. **Parties plaintiff to a suit of foreclosure.**—The question whether the plaintiff had the right to go into equity, and foreclose the mortgage given to the principal to secure the note, depends upon the fact whether he was really interested in the subject matter. *Ord v. McKee*, 5 Cal. 515.

60. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security, and may be enforced by each creditor, as in case of a separate mortgage. But when other parties are interested in the property, the Court will require them to be brought in before ordering a sale or foreclosure. *Tyler v. Yreka Water Co.*, 14 Cal. 212.

61. Where thirteen persons made a joint and several promissory note, payable to three of their number, and all joined in the execution of a mortgage to secure

the payment of the note—the plaintiffs being both payers and payees in the note, and mortgagors and mortgagees in the mortgage—and, subsequently, the payees of the note brought suit against the other makers, and for a foreclosure of the mortgage: *Held*, that the suit was properly brought, and plaintiffs were entitled to a judgment of foreclosure. *McDonnell v. Jacobs*, 10 Cal. 387.

62. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into Court, to await the further decree of the Court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter & Davis, v. Levan and Wife*, 11 Cal. 11.

63. A mere stranger, who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee. *Guy v. Du Uprey*, 16 Cal. 135.

64. A note was executed to O., as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with M., was entitled to one-half of the note: *Held*, that O., having a right to the note, had a right to foreclose the mortgage. 5 Cal. 516.

65. **Parties defendant.**—The general rule of Courts of Equity in foreclosure suits is, that all persons materially interested should be made parties, in order that complete justice may be done and multiplicity of suits avoided. *Montgomery v. Tutt*, 11 Cal. 307.

66. It is not absolutely essential in all cases to make subsequent incumbrancers, prior to suit of foreclosure, parties to the suit. If not so made, they are not bound by the decree; but they are not necessary parties to a decree as between the mortgagor and mortgagee; and in many cases, where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so. *Id.*

67. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under the law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree acquires no title. *Goodenow v. Ewer*, 16 Cal. 461; *Boggs v. Hargrave*, *Id.* 559.

68. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Boggs v. Hargrave*, 16 Cal. 559.

69. A subsequent purchaser of land mortgaged is a proper, if not a necessary, party to a foreclosure suit; and if the complaint be faulty, in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon v. Higuera*, 15 Cal. 483.

70. A person claiming an interest in mortgaged premises, subsequent to the mortgage, is a proper party to the foreclosure suit; but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 265.

71. Where, in suit against husband and wife to foreclose a mortgage given by the husband, and also to set aside a conveyance of the property from him to her, for fraud, the inference from the language of the complaint is that the conveyance was made in the ordinary form of conveyance on purchase, and during marriage; and the wife demurs, on the ground that facts sufficient to constitute a cause of action against her are not set out, in this, to wit: that the facts and circumstances constituting the fraud are averred in general terms only; and that there is a misjoinder of parties, in making her a defendant: *Held*, first, that if she claimed the premises as her separate property by virtue of the conveyance from her husband, that circumstance was sufficient to justify plaintiff in making her defendant; second, that it was immaterial whether the conveyance to the wife was



made with or without a fraudulent intent; that, in either case, it is unavailing against the mortgage, because the inference from the language of the complaint, that the conveyance was upon purchase and during marriage, and, consequently, that the property was common property, is not negated by any averment that the property was transferred to her before marriage, or was a gift to her, or in exchange for her separate property. *Kohner v. Ashenauer*, 17 Cal. 578.

72. Where the homestead was claimed by the husband, on an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings, to be conclusive against either, must embrace both. *Revalk v. Kraemer*, 8 Cal. 66; *Marks v. Marsh*, 9 Id. 96.

73. A defendant in a foreclosure suit cannot object that his wife, who joined in the execution of the mortgage, is not made a codefendant. *Powell v. Ross*, 4 Cal. 197.

74. The vendor or his assignee is not bound to know every assignee of the vendee, however many. *Truebody v. Jacobson*, 2 Cal. 269.

75. A tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *McDermott v. Burke*, 16 Cal. 580.

76. Only those who are beneficially interested in the claim on the estate mortgaged are necessary parties to the foreclosure of a mortgage. *Id.* 590.

77. The interest of the lessee depends for its duration—except as limited by the terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Id.* 580.

78. All persons interested in the premises prior to a suit brought to foreclose a mortgage, or to enforce a mechanic's lien, whether purchasers, lien-holders, devisees, remainder-men, reversioners, or incumbancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interests by conveyance or incumbrance after suit brought need not be made parties. *Whitney v. Higgins*, 10 Cal. 552.

79. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons, and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers*, 9 Cal. 123.

80. A mortgage is not a claim, in the sense of the statute, against the estate of the deceased. The administrator is a proper party for the purpose of liquidating the amount of indebtedness against the estate. *Carr v. Caldwell*, 10 Cal. 360.

81. Where property is mortgaged to secure two notes, falling due at different times, and the mortgage is foreclosed on suit upon the first on its maturity, and then, after the period for redemption has passed, but before the Sheriff has executed his deed to the purchaser, the judgment on the first note is paid: *Held*, that the lien of the mortgage for the second note could not be displaced by a sale under prior incumbrances—mechanics' liens—in proceedings to which the holder of the second note was not a party. *Hocher v. Reas*, 18 Cal. 650.

82. A mortgagee is not concluded, as to the amount due upon a prior mortgage, by a judgment or award thereon in an action or arbitration between the mortgagor and the prior mortgagee, commenced subsequent to the execution of the second mortgage. *Campbell v. Hall*, 16 N. Y. (2 E. P. Smith's) R. 575.

83. The Court, in ordering the sale of mortgaged premises for the satisfaction of the debt, is to take into consideration all the liens which exist subsequent to that of the mortgage itself. As these liens are all cut off by the sale, they must be protected by the Court which orders the sale, or they are lost. Hence arises the necessity of making all the holders of liens of a date later than that of the mortgage, parties to a foreclosure suit. The equities of all such parties are as much before the Court, and as much the objects of its care, as those of the owner of the mortgage primarily to be foreclosed. The Court cannot, of course, content itself with giving such directions as will certainly produce satisfaction of the plaintiff's lien, without regard to its effects upon those which are subsequent, but should make such an

order as, while it fully maintains the priority of the plaintiff, will best protect the rights and preserve the equities of all. (2 Rev. Stat. 193, § 165; *Snyder v. Stafford*, 11 Paige, 71); *Livingston v. Mildrum*, 19 N. Y. (5 E. P. Smith) 440.

84. The validity of the decree and sale in foreclosure is not affected by the fact, that, pending, the suit one of the parties defendant became bankrupt, and had an assignee appointed, who was not brought in as defendant. Persons acquiring new interests in the subject of the action, after its commencement, must assert their interest themselves, or forfeit it. *Cleveland v. Boerum*, 27 Barb. 252.

85. **Pleadings—venue.**—The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts v. White*, 13 Cal. 324, overruling *Vallejo v. Randall*, 5 Id. 462.

86. It is no objection to the regularity of the proceedings in a foreclosure suit, that the place of trial was in a county other than that in which the mortgaged premises are situated, where there has been no motion or demand made to change the place first selected, and a consent to the change, or an order of the Court to that effect. In such a case, after judgment and a sale of part of the property, a purchaser cannot raise the objection that the action was not tried in the county where the mortgaged premises are situated. *Marsh v. Lowry*, 26 Barb. 197.

87. **Pleadings—complaint.**—Foreclosure suits are not governed by section fifty-eight of the Practice Act. *Emeric v. Tams*, 6 Cal. 155.

88. In an action of foreclosure, where the complaint has a copy of the mortgage annexed, and to which it refers, a correct description of the land in the mortgage is sufficient for the purposes of the suit. *Id.*

89. A Court of Equity will, as against the mortgagor, correct a mistake in the description of the mortgaged premises, as a matter of course; and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Woodworth v. Guzman*, 1 Cal. 203.

90. Where the complaint does not charge the mortgagee with negligence and improper conduct in leaving the mortgaged premises, the Court cannot charge the jury thereupon, though evidence may have been admitted on that point. *Benham v. Roue*, 2 Cal. 247.

91. Where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, such sale must stand. *Id.*

92. In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees not exceeding five per cent. of the amount due, it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause or action, but, like costs, a mere incident to it, and might be fixed by the Court, at its discretion, not exceeding the five per cent. *Carriere v. Minturn*, 5 Cal. 435.

93. The complaint in an action by the mortgagor on a policy of insurance issued to him, but in terms payable to the mortgagee, must aver that the mortgage has been paid, or must join the mortgagee as a party. *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 515. See § 39, Nos. 172–176.

**Pleadings—answer.**—See § 46, Nos. 163–167.

94. **Defenses to an action of foreclosure.**—A mortgage executed in 1856, by a *femme covert* under the age of eighteen, upon her separate estate, cannot be enforced against her plea of infancy. *Magee v. Welsh*, 18 Cal. 155.

95. There being no necessity for a foreclosure suit against an estate, where the claim has been allowed, and the policy of the law being against burdening an estate with unnecessary costs, such a bill will not lie. *Falkner v. Folsom*, 6 Cal. 412.

96. That property is so indefinitely described as not to pass title by sale on foreclosure, is no objection to the enforcement of the mortgage against the mortgagor. *Whitney v. Buckman*, 13 Cal. 536.

97. Mere indefiniteness of description in a mortgage is no objection to its enforce-

ment as it is written, whatever the effect of the sale under such a description. The mortgagor cannot complain. *Tryon v. Sutton*, 13 Cal. 214.

98. Suit on a note and mortgage executed by defendants to Sloss & Co., and assigned to plaintiff after maturity. Defendant McD. avers in his answer that the consideration for the note and mortgage was received by his codefendants, and that he executed the same for their accommodation; that the assignment to plaintiff was a fraud on him, McD., and that the consideration of the assignment was paid in whole or in part with money advanced by his codefendants for that purpose; that he also deposited with Sloss & Co., as additional security, certain notes or "scrip," issued by the "Camp Far West Water and Mining Co.," and that prior to the assignment to plaintiff, Sloss & Co. converted these notes to their use, and refuse to account for them: *Held*, that if the averment as to the consideration for the assignment be true, the amount advanced by McD.'s codefendants should be credited on the note and mortgage, and the recovery be limited to the sum actually paid by plaintiff; that if the codefendants paid the whole, the debt was discharged, and plaintiff cannot recover. *Higgins v. McDonald*, 17 Cal. 289.

99. Plaintiff conveyed to Mrs. B., with the consent of her husband, a tract of land in trust for certain children of Mrs. B. by a former marriage. The conveyance acknowledged the payment of a consideration of \$12,000—but no part of this sum was actually paid. To secure its payment, together with other indebtedness, Mrs. B. and her husband executed their promissory notes, and a mortgage upon other property, also held by her in trust for her children. By a subsequent arrangement between the parties, these securities were given up and canceled, and other notes of the same character executed, with a mortgage upon both pieces of property to secure their payment. Plaintiff seeks to enforce a lien against the property for the amount of these notes: *Held*, that as the plaintiff had actual notice of the trust, no equity was created in his favor by the execution of the mortgage, and that the mortgage, as such, was void; that his lien as vendor was waived by the acceptance of the personal security of Mrs. B. and her husband, and his only remedy is personal action on the notes. *Griffin v. Blanchard*, 17 Cal. 70.

100. In this State, where an action on a promissory note, secured by a mortgage of the same date upon real property, is barred by the Statute of Limitations, the mortgagee has no remedy upon the mortgage, and although he may pursue distinct remedies upon the note or the mortgage, the limitation prescribed is the same in both cases. *Lord v. Morris*, 18 Cal. 482.

101. In this State, a mortgage does not, as at common law, give a right of possession to the mortgagee; and hence, from this fact and the difference between the Statutes of Limitations of this and other States, the decisions of Courts in other States to the effect that the mortgagee has a remedy on his mortgage after the note is barred, have no application. *Id.*

102. *Query*: Whether, where a party revives a note secured by a mortgage upon real estate, after the note is barred, he thereby revives the mortgage. *Id.*

103. The provisions of the fourteenth section of the Insolvent Act, providing that all suits brought against the insolvent debtor anterior to his surrender of property shall be transferred to the Court in which said insolvent shall have presented his schedule, does not apply to suits brought for the enforcement of prior liens or mortgages. *Rix v. McHenry*, 7 Cal. 89.

104. Where the estate of an insolvent is subject to liens or mortgages created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus. *Id.*

105. A decree of insolvency, discharging the husband, and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not be thus divested; nor was such the intention of our Insolvent Act. *Bowman v. Norton*, 16 Cal. 213.

106. Where a debtor, who was at the time insolvent, executed a mortgage of all his property and effects to certain specified creditors, to secure his indebtedness to them, and to protect them from liabilities incurred by their indorsement of his paper: *Held*, that the mortgage was not an assignment, either within the letter or spirit of the thirty-ninth section of the "Act for the Relief of Insolvent Debtors and Protection of Creditors," and did not create a trust for the use of the mortgagee prohibited by the Statute of Fraud. *Dana v. Stanford*, 10 Cal. 369.

107. A decree of discharge, under the Insolvent Act, from the payment of a note

secured by mortgage, does not release the lien of the mortgage: it only operates to limit the recovery of the mortgagee to the proceeds of the mortgaged premises. A person claiming an interest in mortgaged premises, subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 265.

108. The holders of two notes, secured by one mortgage, stand in the same relation to the mortgaged premises until a discharge of the mortgage. The discharge by one, though void as to the other, is valid as to the maker, and divests any lien which he had by virtue of said mortgage. *Phelan v. Olney*, 6 Cal. 483.

109. Where a party purchases a bridge, toll-house, stables and outhouses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser nor those claiming under him with notice, can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. *Sparks v. Hess*, 15 Cal. 186.

110. In an action of foreclosure of mortgage, where there are several subsequent incumbrancers, who have been duly served with process and suffered default, and one who was not served, and when it appears that the property has been sold under the decree for a sum less than the amount due upon the mortgage, and no question as to the regularity or fairness of the sale is made, the defendants so served are not in the position to complain that their codefendant was not properly served. *Montgomery v. Tutt*, 11 Cal. 307.

111. The fact that when an installment of interest became due, the mortgagor was unable to find the mortgagee until after the period required for the payment of interest, in order to prevent the principal from becoming due, is not, in the absence of any fraud shown in the plaintiff, a defense to a foreclosure of the mortgage for the payment of the principal. So held, on motion to be let in to defend on that ground, after judgment of foreclosure by default. *Dwight v. Webster*, 10 Abb. Pr. 128.

112. **Defenses, when and how far claim of homestead is.**—Where the husband bought certain land during the absence of his wife from the State, and mortgaged it, and subsequently his wife returned and resided on it: *Held*, that it could not be claimed as a homestead against the mortgage. *Rix v. McHenry*, 7 Cal. 89.

113. Where A, a married man, mortgaged a homestead to B without the concurrence of his wife, and A and his wife subsequently mortgaged to C, and B and C both foreclosed their mortgages, neither making the other a party; whereupon C filed a bill against B to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value \$5,000: *Held*, that C could urge the same objections to the mortgage of B, that A and his wife could; that B's decree was a cloud upon the title and impaired the security, and that C was entitled to have it set aside. *Dorsey v. McFarland*, 7 Cal. 342.

114. Any other rule would allow the husband alone the power to obstruct the power of alienation belonging to both husband and wife. *Id.*

115. Where A, who is a married man, is occupying premises as the tenant of B, and concludes to purchase the same; and to do so, borrows the whole of the purchase money from C; and to secure the payment thereof to C, mortgages the premises to him, but the wife does not sign the mortgage: *Held*, that the homestead right was subject to the mortgage. *Lasson v. Vance*, 8 Cal. 271.

116. Where, after judgment of foreclosure had been taken in an action against the husband solely, on a mortgage on the homestead premises, executed by him alone, the husband and wife joined in a mortgage to a third party: *Held*, that the foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead. *Van Reynegom v. Revalk*, 8 Cal. 75.

117. A mortgage, void because it was upon a homestead, will not become valid by reason of the homestead right being lost by the death of the wife of the mortgagor without children; the debt which the mortgage was intended to secure is not impaired, but it is placed on the same level with the other debts of the mortgagor, and must be enforced in the same manner. *Revalk v. Kraemer*, 8 Cal. 66.

118. The separate property of the husband, acquired before marriage, may become the homestead, as well as the common property of husband and wife. *Id.*

119. A mortgage of a homestead signed by the husband alone is absolutely void where its value does not exceed \$5,000. When a husband ceases to be the head of a family, the right to a homestead also ceases. *Id.*; *Moss v. Warner*, 10 *Id.* 296.

120. The homestead right cannot be tried on a motion to set aside a sale under the mortgage. The husband and wife should have filed a cross bill in the foreclosure suit, or brought an ejectment suit for the property. *Cook v. Alink*, 8 *Cal.* 347.

121. The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Id.*

122. The fact that both husband and wife were anxious to sell their homestead, and the husband had made repeated efforts for that purpose, but failed because a satisfactory price could not be obtained, does not show an intention to abandon the homestead as such. *Dun v. Tozer*, 10 *Cal.* 167.

123. Where a mortgage upon a homestead is executed by the husband, without the wife joining in the execution, it has no validity as a lien upon the premises to the exemption of \$5,000. *Moss v. Warner*, 10 *Cal.* 296.

124. V., a married man, purchased a lot of land of G., and gave a mortgage on the lot to G. for the purchase money; G. subsequently obtained a decree of foreclosure of the mortgaged premises. On the day advertised for the sale, and just before the sale was to take place, V. borrowed of C. money for the purpose of paying off the mortgage and decree, and agreed to give C. a mortgage on the premises to secure the money so loaned; V. paid off the decree, and G.'s mortgage was satisfied. Within a few minutes thereafter, V. gave a mortgage to C. on the premises, in accordance with his agreement. V.'s wife did not join in the mortgage. At the time of C.'s loan, and the execution of the mortgage therefor, the premises were occupied by V. and his wife as a homestead; V. died soon after, and his wife claimed the premises as a homestead: *Held*, that C.'s mortgage took the place of G.'s, and was and is a valid lien on the premises to the extent of the money applied to the satisfaction of G.'s mortgage. *Carr v. Caldwell*, 10 *Cal.* 380.

125. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *Montgomery v. Tutt, Wilson et al.*, 11 *Cal.* 190.

126. A mortgage of the homestead of the family, executed by the husband only, is void. To make such mortgage valid, the wife should join with the husband in the execution of it. *Lies v. De Diablar*, 12 *Cal.* 327.

127. An order of the Probate Court setting apart property as a homestead will not defeat a mortgage which has properly vested as a lien upon the property, where the mortgagor was not a party to such proceedings. *Id.*

128. A mortgage executed by husband and wife of the homestead, after the law of 1860 went into operation, without having filed a declaration to claim the mortgaged property as a homestead, shall be binding. *Cohen v. Davis*, April term, 1862.

129. It does not matter when or how the homestead was acquired, or whether it was common or separate property; it can only be conveyed in the manner prescribed by the law. *Id.*

130. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Id.*

131. Under the Act of 1851, prior to its amendment in 1860, mortgages upon the homestead executed by the husband alone were not absolutely void, but were invalid only to the extent required for the protection of the husband and wife in the enjoyment of their homestead rights. *Bowman v. Norton*, 16 *Cal.* 213.

132. The Act of 1860 materially changes the provisions of the Act of 1851, and renders any mortgage hereafter of the homestead, except to secure or pay the purchase money, invalid for any purpose whatever. *Id.*

133. Where, under the Act of 1851, both husband and wife unite in a conveyance of the homestead, the homestead rights are relinquished, and persons to whom the husband alone had mortgaged the homestead previous to such conveyance may enforce their mortgages against the property in the hands of the grantee. *Id.*

134. Where a note is secured by mortgage upon real property, and subsequently, after the remedy on the note is barred by the statute, the mortgagor executes a second mortgage to a third party, such third party can interpose the plea of the Statute of Limitations in a suit to foreclose the first mortgage, and thus secure

priority for his subsequent mortgage; and this, even though the mortgagor had, after the execution of the second mortgage and after the notice was barred, indorsed on the first note that he renewed, revived and agreed to pay the same. *Lord v. Morris*, 18 Cal. 482.

135. **Evidence.**—Production of the original note and mortgage, and proof of service of summons, are sufficient to justify a decree of foreclosure on default. *Harlan v. Smith*, 6 Cal. 173.

136. Where a mortgage is given to secure a debt, it is not of the essence of the deed whether the debt be evidenced by one form of contract or another. All that a Court of Equity desires to know is, what is the debt really intended to be secured. *Blankman v. Vallejo*, 15 Cal. 638.

137. If a mortgage under seal expressly declares and recites an indebtedness, this is sufficient evidence of the indebtedness in a foreclosure suit. No law requires any note, bond, or the like, in addition to such a mortgage. *Whitney v. Buckman*, 13 Cal. 536.

138. An affidavit by defendant, in effect acknowledging the debt for which suit is brought, is admissible in evidence for plaintiff though made in a former suit between the parties. And although the affidavit was unnecessary, still, this being an equity case, defendant cannot complain that plaintiff proved his case too clearly, or introduced redundant testimony, because the mortgage was uncontradicted and conclusively established the debt. *Id.*

139. Under our system, a mortgage is a mere incident to the debt secured by it, and as the consideration for indorsing a note can be gone into at any time, there can be no reason for adopting a more stringent rule as to the assignment of the mortgage securing it. *Bennett v. Solomon*, 6 Cal. 134.

140. No law authorizes a Recorder or Clerk of a county to record a copy of a deed in the Spanish language, so as to make it evidence, without further proof. *Wilson v. Corbier*, 13 Cal. 166.

141. Parol proof of the existence of a debt intended to be secured by mortgage is admissible. *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 396.

142. The rule which refuses the admission of parol evidence to contradict or vary written instruments is directed to the language employed by the parties, and does not exclude an inquiry into the objects and purposes of the parties in executing the instruments. *Pierce v. Robinson*, 13 Cal. 116.

143. Evidence of the circumstances under which the deed was made, and of the relations existing between the parties, is admitted not to contradict or vary the deed, but to establish an equity superior to its terms. *Id.*

144. Parol evidence is admissible in equity to show that a deed, absolute on its face, was intended as a mortgage. *Id.*

145. Such evidence is not restricted to cases of fraud, accident or mistake in the creation of the instrument. *Id.* Overruling *Lee v. Evans*, 8 Cal. 424, and *Low v. McHenry*, 9 Id. 538.

146. Where a mortgage describes the property as the "interest in the quartz mill and lode formerly owned by John H. Hancock, said interest being one-half of the mill and lode," extrinsic evidence is admissible to identify the property. *Hancock v. Watson*, 18 Cal. 137.

147. In a suit to foreclose a mortgage, it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties by which an assignment of the rents of the mortgaged premises, until full payment of the mortgage debt, is made by the mortgagor and accepted by the mortgagee. *Angier v. Masterson*, 6 Cal. 61.

148. The fact that two or more persons join in the execution of a mortgage of lands does not raise a presumption that the estate mortgaged is joint property. *Bowen v. May*, 12 Cal. 348.

149. A copy of a mortgage is not admissible in evidence when the absence of the original is not accounted for. *Ord v. McKee*, 5 Cal. 516.

150. In an action of foreclosure brought by the administrator upon a note and mortgage given to the testator in his lifetime, a witness whose wife is a sister and heir of the deceased is incompetent upon the ground of interest. *Lisman v. Early*, 12 Cal. 283.

151. The defendant bought of plaintiff land, and gave a mortgage to secure the payment of the purchase money, and on the foreclosure pleaded a want of consid-

eration: it was held that in his defense he was estopped by the terms of his mortgage. *Tartar v. Hall*, 3 Cal. 266.

152. **Referee may be appointed to find amount due.**—The usual and best method of proceeding in cases of foreclosure, is to appoint a master to find and report the amount due, and then exceptions may be filed to the report, upon which the judgment of the Chancellor is given, and this may afterwards be assigned as error. *Guy v. Franklin*, 5 Cal. 416.

153. It is no error for the Chancellor to make the calculations himself; but when he has done so, a mistake in calculation must be brought to his notice in some form analogous to that of an exception to a master's report. *Id.*

154. In a foreclosure action, where a part only of the defendants appeared, the issues were referred, and the referee reported in favor of the plaintiff. But there were other defendants who had not appeared, who had not submitted to the reference, nor did the report of the referee show the exact sum due: *Held*, that it was regular for plaintiff to move for the relief demanded in the complaint, and for the Court to order a reference to ascertain the amount due. *Hill v. McReynolds*, 30 Barb. 488.

155. **Decree and judgment for deficiency.**—In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Raun v. Reynolds*, 11 Cal. 14.

156. The omission of the words "be sold" in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore v. Semple*, 11 Cal. 360.

157. The provisions of the thirty-second section of the Practice Act do not apply to actions for the foreclosure of mortgages on real estate. *Bowen v. May*, 12 Cal. 348.

158. In a foreclosure suit, judgment may be rendered for the amount found due upon the personal obligation, to secure which the mortgage is executed. *Rollins v. Forbes*, 10 Cal. 299; *Rowe v. Table Mountain W. Co.*, *Id.* 441.

159. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted, and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien until the amount of the deficiency to be recovered has been ascertained and fixed. *Chapin v. Broder*, 16 Cal. 403.

160. A foreclosure suit, by our law, results only in a legal ascertainment of the amount due, and a decree directing the sale of the premises for its satisfaction, the surplus, if any, going to subsequent incumbrancers, or the owner of the premises, and execution following for any deficiency. *McMillan v. Richards*, 9 Cal. 365.

161. A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees not exceeding five per cent. of the amount due: *Held*, that the limitation of five per cent. is intended to apply to counsel fees alone, and that the complainant would be entitled to recover the whole of his costs by operation of the statute, and independent of any stipulation. *Gronfier v. Minturn*, 5 Cal. 492.

162. In an action to foreclose a mortgage to recover a debt upon which nothing but the interest was due, the Court below decreed a sale of the property, and directed that the proceeds be applied to the payment of the entire debt; and further decreed, that in case of deficiency of the proceeds, plaintiff recover of defendant the balance and have execution therefor: *Held*, that the latter clause of the decree, giving judgment and execution for the deficiency, must be so modified as to exclude that portion of the debt not due; that as to this the power of the Court, under the statute, was exhausted by decreeing a sale of the property. *Taggart v. San Antonio Ridge, D. and M. Co.*, 18 Cal. 460.

163. In this State, parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency and execution for the same; or they may take a formal judgment for the amount due in the first instance. *Rowland v. Leiby*, 14 Cal. 156.

164. Where A was indebted to B, to secure which indebtedness the latter held the promissory note of the former, and it was agreed that A should give a mortgage upon real estate to secure the indebtedness, and that B should give up and cancel the notes, and waive all claim upon the personal responsibility of A: *Held*, in an action to foreclose the mortgage, that B. was not entitled to a personal decree against A for for any balance which should remain unpaid after the sale of the mortgaged premises. *Moore v. Reynolds*, 1 Cal. 251.

165. It is error to decree that the Sheriff should execute a deed to the purchaser on the foreclosure sale, the land being sold subject to redemption in six months. *Harlan v. Smith*, 6 Cal. 174.

166. A decree of foreclosure cannot be impeached collaterally because entered prematurely. The remedy is by direct proceeding in the action. *Anderson v. Bell*, 9 Cal. 321; *Nagle v. Macy*, Id. 429.

167. In a foreclosure suit the decree will not apportion the debt among the several cotenants of the land who acquired undivided interests therein at the same time and subsequent to the execution of the mortgage. *Perre v. Castro*, 14 Cal. 531.

168. Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died: *Held*, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 Cal. 641.

169. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs v. Hargrave*, 16 Cal. 559.

170. Where proceedings in a foreclosure suit were delayed by agreement, in consideration of the execution of a second mortgage on other property in which third parties joined as additional security, and subsequently plaintiff filed a supplemental bill setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the Court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale, but that no bid should be received for a less sum than the full amount of judgment and costs; if this sum was not bid, then the whole property included in the two mortgages—from Reynolds and from Kirk and Reynolds—was to be sold together: *Held*, that the decree is erroneous. *Raun v. Reynolds*, 11 Cal. 14.

171. The foreclosure operates, except in a single instance, only upon the estate or interest which the mortgagor possessed at the time, and the sale under the decree passes, with the like exception, only such estate or interest. The exceptional instances arise where the mortgagor has, subsequent to the execution of the mortgage, acquired a title which enures by way of estoppel to the benefit of the mortgagee. In such case the foreclosure operates upon the subsequently acquired title to the same extent as if originally held by the mortgagor, and the sale under the decree passes it. In all other cases, the estate mortgaged is the only estate brought under the consideration of the Court, and the only estate affected by its decree. *San Francisco v. Lawton*, 18 Cal. 465.

172. **Erroneous decree, how relief from granted.**—Courts of Equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ewer*, 16 Cal. 461.

173. Plaintiff must seek relief from the consequences of the invalidity of the decree by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the Court in that suit as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case



may justify. Upon his application, that Court may direct the sale to be set aside and the satisfaction to be canceled; and authorize a supplemental bill for a resale of the premises, to be filed and conducted in the names of the complainants in that suit for the plaintiff's benefit; and direct that the grantee of the mortgage, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties and mete out exact justice. *Boggs v. Hargrave*, 16 Cal. 559; *Phelan v. Olney*, 6 Id. 478.

174. In a case where, under a decree of foreclosure and sale, H. had come into the possession of the mortgaged premises, and subsequently, on appeal to the Supreme Court, the decree was reversed, with direction that the sale under it be set aside; that defendants in the suit be restored to the property sold, and that the Court below should proceed to dispose of the case in pursuance of the principles of the opinion. *Rawn v. Reynolds*, 15 Cal. 468.

175. The acceptance of a deed of real estate, which states that the land is conveyed "subject to a mortgage," does not make the grantee personally liable for a deficiency on foreclosure. (4 Sandf. 516; 1 Duer, 412; limiting *Halsey v. Reed*, 9 Paige, 446; 10 Id. 595; 2 Barb. 16; 2 Sandf. Ch. 478; 2 Barb. Ch. 618; 14 Barb. 196; 7 Paige, 594; 2 Den. 595; 6 How. Pr. 208.) *Stebbins v. Hall*, 29 Barb. 524.

176. **Death of mortgagor after decree, effect of.**—Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency; and after the entry of the decree the husband died: *Held*, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Bucklew*, 14 Cal. 640.

177. Where the mortgagor dies after decree of foreclosure entered, and no administration is had upon his estate, it seems that there is no reason why the execution of the decree should be stayed. The suit is in the nature of a proceeding *in rem*. The decree binds the specific property, and the case is within the reason of the proviso in section one hundred and forty-one of the Act concerning the Estates of Deceased Persons. *Naglee v. Macy*, 9 Cal. 426.

178. **Equity of redemption.**—The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof, until foreclosure and sale, to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 609.

179. The equity of redemption of a subsequent incumbrancer, who has been made a party and had his day in Court, is by the decree taken away, leaving only the statutory right. *Montgomery v. Tutt*, 11 Cal. 307.

180. Their equity of redemption from the foreclosure, if not made parties, continues, and they can assert at any time within the period allowed by the Statute of Limitations. *Id.*

181. The estate of a mortgagor and of a judgment debtor after sale stand upon the same footing, and the insertion in the decree of a clause foreclosing the equity of redemption is a useless formula, which cannot enlarge the effect of the decree, or any rights of the mortgagee under it. *McMillan v. Richards*, 9 Cal. 365.

182. Possibly, a Court of Equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *McDermott v. Burke*, 16 Cal. 580.

183. It is error to decree that the Sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption in six months. *Harlan v. Smith*, 6 Cal. 173.

184. But such an error may be amended, without depriving the plaintiff in foreclosure of the benefit of the decree to which he is entitled. *Id.*

185. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system; so far, at least, as the owner of the estate is concerned. *Goodenow v. Ewer*, 16 Cal. 461.

186. Proceedings in the nature of a suit to foreclose an equity of redemption held by a subsequent incumbrancer may be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the Statute of Limitations, be thus reduced to the statutory period of six months. *Id.*

187. **Lessee, rights of on foreclosure and sale.**—There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises—except where the purchaser is precluded by his acts or declarations from thus treating him. *McDermott v. Burke*, 16 Cal. 580.

188. The interest of the lessee, in such case, depends for its duration—except as limited by the terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Id.*

189. Where the owner of mortgaged premises leases them for a term of years, and the rent is paid in advance by the tenant: *Held*, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 596.

190. **Mortgages on public lands.**—A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the Chattel Mortgage Act. That act gives a new remedy, but does not take away the old. *Haffley v. Maier*, 13 Cal. 13.

191. The mortgagor, having mortgaged the land as his own property, is estopped, as are his privies in estate, from saying it is public land. *Id.*

192. The right to a preemption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a preemption right, or any other purpose, or the land itself, may be mortgaged; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it. *Whitney v. Buckman*, 13 Cal. 536.

193. **Sale under decree.**—A mortgagor, after the sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the Sheriff's deed; but he possesses no right to despoil the property of its fixtures. The deed of the Sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands v. Pfeiffer*, 10 Cal. 258.

194. The engine and boilers, etc., used in a flour mill, being permanently fastened to the mill, which had its foundation in the ground: *Held*, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage; and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure. *Id.*

195. The well established rules of equity proceedings require in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second. *Raun v. Reynolds*, 11 Cal. 14.

196. The title of a purchaser, under a sale on a decree of foreclosure, cannot be impeached in a collateral action for irregularity in the proceedings on the sale. *Nagle v. Macy*, 9 Cal. 426.

197. What is meant by Sheriff's deed, made on sales under decrees in foreclosure suits, taking effect by relation from the date of the mortgage, explained. *Goodenow v. Ewer*, 16 Cal. 461.

198. The doctrine of *caveat emptor* applies only to sales made upon valid judgments; and is usually invoked with reference to sale upon execution against the general property of a judgment debtor. In such cases, a defect of title is no ground for interference with the sale. *Boggs v. Hargrave*, 16 Cal. 564.

199. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest

may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes that risk. To that extent the doctrine of *caveat emptor* applies, even in those cases, and in all cases of adjudication upon specific interests; but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Id.*

200. When a purchaser at a sale under a decree in a foreclosure suit, directing the sale of the premises—which decree was void because the grantee of the mortgagor was not made a party—brought suit against the mortgagees to recover back the money paid them on his bid—the purchaser being aware at the time of his bid that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud: *Held*, that the action does not lie. The plaintiff must seek relief from the consequences of the invalidity of the decree by proceeding in the foreclosure suit. *Id.*

201. C. being in the occupation of certain premises, conveyed them to B., who executed a mortgage back to C. as security for the purchase money. The conveyance and mortgage were simultaneous acts, and both were of the premises in fee. The legal title was not at the time in C., and B. afterwards purchased it in, and then executed a mortgage to T.: *Held*, that the title subsequently acquired by B. inured to the benefit of his mortgagee, C.; and that a purchaser under the decree foreclosing T.'s mortgage could only claim in subordination to C. *Clark v. Baker*, 14 Cal. 612.

202. On foreclosure and sale in a case of leasehold premises under a mortgage thereof, the purchaser at the sale is not necessarily to be discharged because the ground rent is in arrear, and the lessors have given notice of intention to reënter for nonpayment. *Holden v. Sackett*, 12 Abb. Pr. 473.

203. It is the duty of the Sheriff, in such case, to pay out of the purchase money so much of the ground rent as was due and in arrear, unpaid at the time of the sale; and as to the rent payable after the sale, it is the duty of the purchaser to pay that himself. *Id.*

204. By well-settled rules of law, as well as by the express terms of our statute authorizing sales in foreclosure, such sale passes all the title of each and every of the parties to the suit, and the deed of the Sheriff is as effectual as if the mortgagor and mortgagee had united in a deed conveying to the purchaser their respective interests in the property, and is an entire bar against all parties to the suit. *Id.*

205. Where a part of mortgaged premises had been released from the mortgage, and on a foreclosure the complaint stated the release, and the decree of sale excepted the released portion from the effect of the decree, but through inadvertence the master's deed upon the sale included it: *Held*, that it did not convey the released portion of the premises, and could not affect the title of the real owner. The master could not convey premises which the complaint did not claim, and of which the decree did not authorize a sale. *Lavery v. Moore*, 32 Barb. 347.

206. In selling lands under their own decree, the Court of Chancery may be regarded as the trustee for the owners and parties in interest. And where persons appeared in the action in which the decree was rendered, representing themselves as parties thereto, and entitled to be heard, and the Court applied the proceeds of the sale to such uses as they directed, they, and persons claiming under them, must be deemed to have adopted, ratified and affirmed the sale, and all that the Court of Chancery did in the premises. (6 Hil. 4; 3 Comst. 511; 8 Wend. 483; 3 Hil. 215;) *Requa v. Holmes*, 19 How. Pr. 430, qualifying 16 N. Y. (2 Smith) 193.

207. **Writ of assistance.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the Sheriff's deed. *Montgomery v. Tutt*, 11 Cal. 190; *Wolf v. Fleischacker*, 5 Id. 244; *Reynolds v. Harris*, 14 Id. 677.

208. Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the Court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ, as against the defendant in the suit. *Id.*

209. If a writ of assistance be improperly issued or executed, the Court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Skinner v. Beatty*, 16 Cal. 156.

210. *Prima facie*, plaintiff in a foreclosure suit is entitled, after sale of the premises and Sheriff's deed to him, to a writ of assistance as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession. *Id.*

211. Where, in such case, a writ of assistance is granted, and the mortgagee and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continuously ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Id.*

212. A purchaser at a judicial sale, under a judgment which directs that the purchaser be put in possession, is entitled to a writ of assistance if necessary, and this, notwithstanding the death of the plaintiff after judgment and before the sale. A revival of the action is not necessary. The application for a writ of assistance may be made *ex parte*. *Lynde O'Donnell*, 12 Abb. Pr. 286.

213. **Vendor's lien.**—A vendor has a lien on the land sold for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 138.

214. And when the vendor has not conveyed the title, his position is analogous to that of a mortgagee. *Id.*

215. The lien which springs out of a title bond, predicated upon the covenants for the purchase money, attaches upon the land, unless expressly reserved; and if such reservation be made, it lies upon the purchaser to show it. *Truebody v. Jacobson*, 2 Cal. 269.

216. And if the time for payment be extended beyond the period named in the bond, this does not release the lien. *Id.*

217. Nor does taking a note for the purchase money affect the lien; and if part be paid, the lien is good for the residue, and the vendee becomes a trustee for all that remains unpaid. So the lien attaching to the land, an assignment with or without notice cannot affect the rights of the vendor. *Id.*

218. The term within which payment may be made by the vendee to extinguish the lien is limited, and ends after a sale under a judgment for the purchase money. *Id.*

219. B. bought the premises in controversy, and executed a note in part payment, which was afterwards transferred to the plaintiff. Soon after the transfer, the plaintiff loaned B. an additional sum, and took his note and a new mortgage on the same lot, and his interest in another lot, and caused the first mortgage to be canceled, and satisfied of record. In a suit to foreclose the mortgage, the wife of B. intervened, and claimed the premises as a homestead: *Held*, that the land was liable for the remainder of the purchase money, no matter to what purpose it might be devoted. *Dillon v. Byrne*, 5 Cal. 455.

220. The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker v. Sedgwick*, 8 Cal. 398.

221. In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution, under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and return of *nulla bona* to sustain the allegation of insolvency. *Id.*

222. A vendor's lien does not exist in this State, where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land. *Hunt v. Waterman*, 12 Cal. 301.

223. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 186.

224. The equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The Court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency,

or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Id.*

225. If the first order of sale on a foreclosure decree be not executed, a second order may issue. Such second order might in some cases be ground of objection on the score of costs, but it is not objectionable as affecting the validity of the sale. *Shores v. Scott River Water Co.*, 17 Cal. 626.

226. The execution of two notes for the amount due upon a note and mortgage, when the mortgage is not canceled, will not defeat an action for the foreclosure of the same, commenced after the second notes are due and unpaid. *Creary v. Bowers*, Jan. 1862.

227. It could not be a defense that only one note was due, as that would be sufficient to show a failure of performance. *Id.*

228. If the mortgage was void, this fact does not invalidate the debt intended to be secured by the mortgage. *Shaver v. Bear River and Auburn Water & Mining Co.*, 10 Cal. 396.

### § 247. *Disposition of surplus money after sale.*

If there be surplus money remaining after payment of the amount due on the mortgage, lien or incumbrance, with costs, the Court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in Court.

### § 248. *Proceedings when debt falls due at different times.*

If the debt for which the mortgage, lien or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the Court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest, where such rebate is proper.

See notes under § 246.

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## CHAPTER II.—*Actions for nuisance, waste and willful trespass, in certain cases, on real property.*

### SEC. 249. *Nuisance defined and actions for.*

#### 250. *Waste, actions for.*

#### 251. *Trespass for cutting or carrying away trees, etc., actions for.*

#### 252. *Measure of damages in certain cases under the last section.*

#### 253. *Damages in actions for forcible entry, etc., may be trebled.*

§ 249. *Nuisance defined, and actions for.*

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

1. **What is nuisance.**—The fact whether a structure was a public nuisance is a question, not for the Court, but for the jury to decide. *Gunter v. Geary*, 1 Cal. 466.

2. It is a public nuisance to erect a house in a highway. *Id.*

3. A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate; and the private rights of the individual yield to considerations of general convenience and the interest of society. *Surocco v. Geary*, 3 Cal. 73.

4. The constitutional provision which requires payment for private property taken for public use, does not apply to the destruction of a house to check a conflagration; nor can he who abates this nuisance be made personally liable for trespass, unless the act is done without actual or apparent necessity. *Id.*

5. The erection of a steam engine, and machinery, and a grist mill in the cellar, under an auction store, held not to be such an injury as to require a restraining power of the Court; at least, not until the question of nuisance should be determined by a jury, and even then the remedy at common law is adequate. *Middleton v. Franklin*, 3 Cal. 241.

6. All that part of a bay or river below low water or low tide is a public highway common to all citizens, and if any person appropriates it to himself exclusively, the presumption is that it is a detriment to the public. *Gunter v. Geary*, 1 Cal. 462.

7. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the Court ordered a reduction of the dam so as to prevent the overflow, or if necessary, its entire abatement. *Ramsay v. Chandler*, 3 Cal. 241.

8. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Parke v. Kilham*, 8 Cal. 77.

9. A person may construct or continue what would otherwise be an actionable nuisance, provided that at the commencement of it no person was in a condition to be injured by it, or in other words, mere priority as between owners of the soil gave a superior right. *Tenney v. Miners' Ditch Co.*, 7 Cal. 339.

10. The diversion of a water-course is a private nuisance. *Tuolumne Water Co. v. Chapman*, 8 Cal. 397.

11. **Jurisdiction of actions concerning nuisances.**—The term "special cases" in the Constitution, does not include any class of cases for which the Courts of general jurisdiction have always supplied a remedy, as in cases to abate a nuisance. *Parsons v. Tuolumne County W. Co.*, 8 Cal. 44.

12. The statute of this State defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of the nuisances which the statute does not embrace. *Stiles v. Laird*, 5 Cal. 122.

13. The District Courts have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the County Courts cannot take away the constitutional jurisdiction of the District Courts. *Fitzgerald v. Urton*, 4 Cal. 238.

14. **Actions to abate nuisances, parties, etc.**—A common nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it without regard to

the question whether it is an immediate obstruction or injury to him. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it. *Guster v. Geary*, 1 Cal. 462.

15. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Kilham*, 8 Cal. 49.

16. To entitle a party to an injunction in a case of a nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages. *Middleton v. Franklin*, 3 Cal. 241.

17. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102.

18. In action of nuisance or trespass the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

19. In an action to abate a nuisance caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in the answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes, which allegations were stricken out on motion of plaintiff's attorney: *Held*, that they were properly stricken out as irrelevant, for if true, they constituted no defense to the action. *Weimer v. Lowry*, 11 Cal. 112.

20. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: *Held*, that the action was premature, and that the demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey v. Chilton*, 11 Cal. 120.

### § 250. Waste, actions for.

If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for triple damages.

1. At common law there is no forfeiture of an estate for years for the commission of waste, but it was made so by the statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to triple damages. *Chipman v. Emeric*, 3 Cal. 283.

2. In an action for waste, when triple damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either cite the statute, or conclude to the damage of the plaintiff against the form of the statute. *Id.* 5 Cal. 240.

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the Court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 Cal. 116.

4. On application for injunction to restrain waste or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Id.*

§ 251. *Trespass for cutting or carrying away trees, etc., actions for.*

Any person who shall cut down, or carry off any wood or underwood, tree or timber, or girdle or otherwise injure any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town; or on the street or highway in front thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction.

1. An action may be maintained against a trespasser who is cutting timber, as soon as the timber is cut. *Sampson v. Hammond*, 4 Cal. 184.

2. An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute; especially, where the defendant's bond will fully protect the defendant for any delay if it should turn out that they have the right. *Bucklewo v. Estill*, 5 Cal. 108.

3. The measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them, considering the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Chipman v. Hibbard*, 6 Cal. 162. See also § 112 and notes, 34 *et passim*.

§ 252. *Measure of damages, in certain cases, under the last section.*

Nothing in the last section shall authorize the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

§ 253. *Damages in actions for forcible entry, etc., may be trebled.*

If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

1. When treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of a statute. *Chipman v. Emeric*, 5 Cal. 240; *contra*, *O'Callaghan v. Booth*, 6 Id. 66.

2. If the Court refuses to treble the damages, the plaintiff has an adequate remedy by appeal, and an application for mandamus to the Court below to render judgment for treble damages must be denied. *Early v. Mannix*, 15 Cal. 150.



CHAPTER III.—*Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.*

SEC. 254. *Parties to an action to quiet title.*

255. *When plaintiff shall not recover costs.*

256. *If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.*

257. *When value of improvements shall be allowed as a set-off.*

258. *An order may be made to allow a party to survey and measure the land in dispute.*

259. *Order, what to contain and how served; if unnecessary injury done the party surveying, to be liable therefor.*

260. *A mortgage shall not be deemed a conveyance, whatever its terms.*

261. *When Court may grant injunction; during foreclosure; after sale on execution; before conveyance.*

262. *Damages may be recovered for injury to the possession after sale and before delivery of possession.*

263. *Action not to be prejudiced by alienation pending suit.*

§ 254. *Parties to an action to quiet title.*

An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

1. Any person in possession may bring this action against any party who claims an estate or interest adverse to him. *Merced Mining Co. v. Fremont*, 7 Cal. 319.

2. The effects of this provision apply to mining claims. *Id.*

3. To maintain a suit to quiet title by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession. *Smith v. Brannan*, 13 Cal. 107.

4. A jury being waived, it is immaterial whether an action under section two hundred and fifty-four of the Practice Act is an equitable or a legal proceeding. *Id.*

5. The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operation, is in the nature of a bill to quiet title—to determine an estate held adversely to him—to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud,

acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complaint must therefore possess a title superior to that of his adversary, and of course to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

6. Section two hundred and fifty-four of the Practice Act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis v. Sutter*, 15 Cal. 259.

7. Suit under section two hundred and fifty-four of the Practice Act only lies with reference to property of which the plaintiff is in possession; and where suit is brought under that section to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's title. And if the grantees under such conveyances should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Id.*

8. In such suit the Court, sitting in equity, may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury, if questions of a purely legal character in relation to the title arise. *Id.*

9. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. *Id.*

10. The statute (Pr. Act, § 254) giving a right of action to a party in possession of real estate to determine adverse claims, does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but embraces every description of claim whereby the plaintiff might be deprived of the property, or its title be clouded, or its value be depreciated, or whereby he might be incommoded or damaged by the assertion of an outstanding title already held, or to grow out of the adverse pretension. *Head v. Fordyce*, 17 Cal. 149.

## ACTION OF EJECTMENT.

11. **Generally.**—Ejectment is a possessory action, and must be brought against the occupant; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. *Garner v. Marshall*, 9 Cal. 268.

12. In ejectment the legal title must control. *Estrade v. Murphy*, 19 Cal. 248.

13. Under our system, probably, an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. *Ortman v. Dixon*, 13 Cal. 33.

14. Many Mexican grants are legal titles, and most of them are, when united to possession, such equitable titles as are entitled to protection, and give a right to a possessory action. *Lathrop v. Mills*, 19 Cal. 513.

15. The purchaser of an equitable title takes the property subject to all existent equities. He is not within the rule which protects a *bona fide* purchaser for value and without notice of the real or apparent legal title. *Dupont v. Wertheman*, 10 Cal. 354.

16. A perfect equity united with possession is, under our system, equivalent, for all purposes of defense, to a legal title. *Morrison v. Wilson*, 13 Cal. 494.

17. Parties having the title, and the present right of possession, can always enter peaceably into the possession of premises, and cannot be held liable for so doing in trespass or ejectment. If he uses force, the remedy is by forcible entry and detainer. *Norton v. Hyatt*, 8 Cal. 539.

18. **Possession.**—Prior possession is evidence of title; but this evidence may be destroyed by abandonment. *Bird v. Lisbros*, 9 Cal. 1.

19. A party in possession of land is deemed in law the owner against all persons but one having superior title thereto; possession is evidence of title, and the

possessor, in conveying, is deemed to convey the title itself sufficiently to enable his grantee to maintain ejectment against a mere trespasser. *Id.*

20. It is the settled doctrine of the law, repeatedly affirmed by this Court, that the prior possession of the plaintiff, or parties through whom he claims, is sufficient evidence of title to support the action of ejectment. *Nagle v. Macy*, 9 Cal. 426; *Grover v. Hawley*, 5 Id. 485; *Hutchinson v. Perly*, 4 Id. 33; *Winans v. Christy*, Id. 70; *Plume v. Seaward*, Id. 94.

21. Where a party takes possession of a tract of land, and incloses it with a fence, consisting of posts seven feet apart and one board six inches wide nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed to the whole. *Baldwin v. Simpson*, 12 Cal. 560.

22. Possession of land at the death of a party gives *prima facie* title to his heirs or representatives. *Gregory v. McPherson*, 13 Cal. 562.

23. It is sufficient in our system, if it appear that the plaintiff was entitled to possession of the premises at the commencement of the action and the date of the alleged seizin or possession, and ouster is only material when the question of mesne profits is involved. *Yount v. Howell*, 14 Cal. 465.

24. In ejectment, a variance between the alleged seizin and right of possession of plaintiff and the date of conveyance to him is immaterial, if the latter be previous to the commencement of the action. Right of possession in plaintiff and occupation by defendant at that time are sufficient. *Stark v. Barrett*, 15 Cal. 361.

25. Where plaintiff relies, not on the Possessory Act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Coryell v. Cain*, 16 Cal. 567.

26. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the Government, is considered vested in the first possessor, and to proceed from him. This possession must be actual and not constructive; and the right it confers must be distinguished from the right given by the Possessory Act of the State. *Id.*

27. In ejectment, plaintiffs may rely on prior possession, and the legal title is not necessarily involved. *Grady v. Early*, 18 Cal. 108.

28. **Possession with color of title.**—Where a party takes possession of a part of a tract of land, under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed. *Rose v. Davis*, 11 Cal. 133.

29. Possession of a part, under the deed to the whole tract, where the possessor's grantors had the land surveyed, and the lines marked by the blazing of trees, is sufficient possession as against a party who enters upon a part of the tract and builds a fence wholly insufficient for any other purpose than to mark the line of his claim. *Baldwin v. Simpson*, 12 Cal. 560.

30. Defendant had been let into possession under judgment in ejectment by him against C. This judgment was afterwards reversed. C. sells to G.: *Held*, that defendant's possession was sufficient, until restored by due course of law, to break the force of the claim of G. based upon the prior possession of C. *Gregory v. Haynes*, 13 Cal. 591.

31. Mere prior possession of land cannot prevail against the present possession of defendant, taken under claim of title derived, regularly or not, from the rightful owner. *Id.*

32. **What constitutes possession.**—The fact that cattle and horses of a person have roamed over and grazed upon a certain tract of land does not of itself alone make out an actual possession of land in him. *Suñol v. Hepburn*, 1 Cal. 254.

33. A mere survey and marking lines of a boundary, without an inclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands. *Bird v. Dennison*, 7 Cal. 297.

34. To constitute possession of land there must be an actual, *bona fide* occupation, or *possessio pedis*, a subjection of it to the will and control of the possessor, as contradistinguished from a mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc. *Plume v. Seward*, 4 Cal. 94, affirmed by *Bird v. Dennison*, 7 Cal. 297.

35. An actual inclosure, the defendant residing or having tenants and a dwelling within it; the continued claim to the property, holding a deed purporting to convey the title; selling a portion; using a portion for a milk ranch or other agricultural purposes; the laying off of the property into lots, making houses, and the occupation of tenants; fencing in smaller portions of the tract, and repeated acts of dominion over different parts of it—these acts continued, or done at intervals for a series of years, would seem conclusive of the fact of actual possession, and would not be rebutted by the mere fact that occasionally an exterior fence was out of repair, or that it was not always sufficient to prevent forcible intrusion into the premises by persons or cattle; nor would it be rebutted by an occasional trespass upon small parcels of the tract, committed by persons setting up no title save that of mere entry and possession. *City and County of San Francisco v. Beideman*, 17 Cal. 463.

36. The fact that a party had cattle on the land, or was there for short periods himself, or that he claimed within given limits, is, in the absence of any inclosure or some visible physical signs of the extent of his boundaries or claim, insufficient to show the fact of possession of any particular tract, when others were also in possession. *Wilson v. Corbier*, 13 Cal. 166.

37. The actual possession, by virtue of which parties obtain the title of the city of San Francisco to the pueblo lands, under the second section of the Van Ness Ordinance, means a possession accompanied with the real and effectual enjoyment of the property; that possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by *occupation, or cultivation, or other appropriate use*, according to the locality and character of the particular premises. An *inclosure*, by an ordinary fence, of the premises, without residence thereon, or improvements, or cultivation, or other acts of ownership, is of itself insufficient. *Wolf v. Baldwin*, 19 Cal. 306.

38. A mere inclosure by a fence is of itself only the declaration of an intention to appropriate and possess the premises; but does not, unaccompanied with any other acts, constitute the *actual* possession contemplated by the ordinance. *Id.*

39. **Effect and extent of possession.**—The possession of a party who has neither title nor color of title does not extend beyond the metes and bounds of his actual occupation; and this is so according to Spanish and Mexican, as well as English and American law. *Suñol v. Hepburn*, 1 Cal. 254.

40. A party cannot, by the Mexican law, acquire possession beyond the metes and bounds of his actual occupancy, unless he claims to hold under what is termed a just title (*titulo justo*); and a deed void on its face is not a just title. *Id.*

41. Possession of public land carries with it the privileges and incidents of ownership against every one but the Government, subject only to rights antecedently acquired. *Crandall v. Woods*, 8 Cal. 136.

42. The Van Ness Ordinance does not limit the quantity of land to which the actual possessor acquires the title of the city; and the Courts cannot annex any limitation, but can only hold parties to clear proof of the actual possession. *Wolf v. Baldwin*, 19 Cal. 306.

43. **Possession under the Possessory Act.**—A party relying on the Possessory Act of the State must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual inclosure or actual possession of the whole claim. *Coryell v. Cain*, 16 Cal. 567.

44. **Place of trial of actions of ejectment.**—See *ante*, § 18.

45. **Parties, plaintiff.**—Actions of ejectment must be prosecuted in the name of the real party in interest. *Ritchie v. Dorland*, 6 Cal. 33.

46. In ejectment for common property, the action should be in the name of the husband alone. But if the wife be joined, the misjoinder is no ground of nonsuit on the trial, though it would be ground of demurrer if the defect appeared on the

face of the complaint, or for motion to dismiss, as to the wife, on the trial. *Moss v. Smith*, 16 Cal. 533.

47. In this State, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is, therefore, a necessary party to all suits affecting it. *Harwood v. Marye*, 8 Cal. 580; and see further *ante*, § 6, No. 2.

48. The statute which gives the possession and control of real property belonging to intestates to their administrators, until administration of the estate and distribution of the property are had, only applies to cases arising since the statute was passed. *Soto v. Kroder*, 19 Cal. 87.

49. In this State, a plaintiff claiming as heir-at-law can recover in an action of ejectment without an entry upon the premises after the death of his ancestor. It is sufficient that he show his title as heir to the premises demanded. *Id.*

50. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quit-claimed to plaintiff, representing M., who had conveyed to plaintiff as security for indorsements. Another portion of the land was set apart and quit-claimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: *Held*, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the indorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 304.

51. All persons holding as tenants in common, joint tenants, or coparceners, or any number less than all, may, jointly or severally, bring or defend any civil action for the enforcement or protection of the rights of such party. Statutes of 1857, 62.

52. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collin v. Corbett*, 15 Cal. 183.

53. Such grantee, though seized in fee of only an undivided interest in the particular parcel of land, may recover in ejectment the whole of that parcel, as against all persons except the original cotenant and his grantees. He is entitled to the possession of the entire premises as against all other parties. *Stark v. Barrett*, 15 Cal. 361.

54. A nonresident alien may doubtless maintain ejectment. *State v. Rogers*, 13 Cal. 165.

55. **Parties, defendant.**—The plaintiff in ejectment may sue one or more defendants, and they may answer separately or demand separate verdicts; unless they do so, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 70.

56. The plaintiff may join any number of parties defendant, without regard to the extent or character of their possession, subject only to their right to answer separately and have separate verdicts. *Ritchie v. Dorland*, 6 Cal. 33.

57. When the premises are unoccupied, parties out of possession claiming title, which claim is accompanied with the exercise of acts of ownership, as inclosure, cultivation and the like, may be made defendants. *Garner v. Marshall*, 9 Cal. 268.

58. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. *Waring v. Crow*, 11 Cal. 366.

59. In ejectment, suit must be brought against the terre-tenant or party in possession. *Klink v. Cohen*, 13 Cal. 623.

60. Where several persons conspire to obtain the land of plaintiff, and in suit against them to recover the property, two of the defendants disclaim all interest therein: *Held*, to be no ground for dismissing the suit as to them, as they were proper parties and are liable for costs. *Dupery v. Leavenworth*, 17 Cal. 262.

61. Cases where the Court below set aside a judgment by default in ejectment, and allowed the landlords of the defendants to come in and defend. *Barrett v. Graham*, 19 Cal. 632; *Roland v. Kreyenhagen*, 18 Id. 455.

62. **Abatement by death of a party.**—See *ante*, § 16, Nos. 2, 4.

63. **Complaint.**—In real actions, it is necessary for the demandant to allege, and, if traversed, prove a seizin in himself, or his ancestors through whom he

claims; and in general it is also necessary to aver that he was seized by taking the espies or profits. *Payne v. Treadwell*, 5 Cal. 310.

64. Complaint in ejectment averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, is sufficient. *Boles v. Cohen*, 15 Cal. 150.

65. Complaint in ejectment need not state the exact time of the alleged ouster, especially when no claim is made for damages and no recovery had for them—the allegation in this case as to time of ouster being, “on or about December 12th, 1857.” *Collier v. Corbett*, 15 Cal. 183.

66. A complaint in ejectment should not set out the mesne conveyances through which plaintiff derails title. These are matters of evidence, not of pleading, and should be stricken from the complaint, on motion. *Coryell v. Cain*, 16 Cal. 567.

67. In ejectment, an allegation of the value of the use and occupation, rents and profits of the premises for the period during which defendants were in the wrongful possession and excluded plaintiff, is sufficient to charge defendants, without any averment that they received such rents and profits. The terms “rents and profits” are not used in the present case in a technical sense. The whole averment is in effect only that the value of the use of the premises while plaintiffs were wrongfully excluded was the amount stated. *Patterson v. Ely*, 19 Cal. 28.

68. Joinder of causes of action, and how stated.—Under our Practice Act, it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action. *Sullivan v. Dover*, 4 Cal. 291; see further, *ante*, § 64.

69. Description of the land.—A complaint in ejectment describing the premises as “Lot No. 1, in Block No. 23, as per plot of the town of Red Bluff, as laid out by the Red Bluff Land Corporation in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley,” and specifying the county in which they are situated by the terms “in said county,” referring to the designation “county of Tehama,” in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 432.

70. Where a complaint in ejectment described the land thus: “All that certain tract or parcel of land situated in Napa county, consisting of a preemption claim of one hundred and sixty acres of land, commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging, and being about five miles from Napa City in a northerly direction:” *Held*, that the description is sufficient to support a judgment for plaintiff. *Whitney v. Woods*, 19 Cal. 300.

71. Section fifty-eight of the Practice Act, that “in an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint,” is directory only, for a failure to comply with which the complaint is liable to a special demurrer; but if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this subject, the plaintiff may after verdict take judgment, and the Court cannot set it aside on motion of defendant on account of this defect of pleading. *Id.* See § 58.

72. Complaint in ejectment.—See further, *ante*, § 39, Nos. 119–147.

73. Lis pendens, filing and effect of.—See *ante*, § 27.

74. Receivers.—Receivers in actions of ejectment should not be appointed. *Thompson v. Sherrard*, 12 Abb. P. 427.

75. Injunction.—An injunction may be obtained in ejectment. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

76. Answer.—When a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or confessing them, should state distinctly and positively new matter sufficient to avoid them. *Ladd v. Stevenson*, 1 Cal. 18.

77. An allegation, in a verified complaint, that “defendants wrongfully and

unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiff, because such denial admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 91.

78. Unless the answer denies the allegations of the complaint, they are admitted without further proof, damages included. *Patterson v. Ely*, 19 Cal. 28.

79. When an equitable answer is interposed to an action of ejectment, said answer being a bill in equity, can only be interposed where the parties to the action are such as would be required to a bill in equity seeking the same relief. *Lestrade v. Barth*, Jan. 1862.

80. An answer in ejectment setting up an equitable defense is in the nature of a bill in equity, and must contain its essential averments. The defendant then becomes an actor with respect to the matter alleged by him, and his defense must be of such a character as may be ripened by the decree of the Court into a legal right to the premises, or as will estop the prosecution of the action of the plaintiff. *Estrade v. Murphy*, 19 Cal. 248; *Meador v. Parsons*, 19 Cal. 294.

81. Where there are several defendants, to entitle them to separate verdicts they should set forth with specific description the parcels which they severally occupy or claim. *Patterson v. Ely*, 19 Cal. 28; *McGarvey v. Little*, 15 Id. 31.

82. The husband or the wife may set up the fact of homestead as a defense to ejectment based upon a Sheriff's deed of the premises, made in pursuance of an execution sale on a judgment at law against the husband—there having been no abandonment of the homestead. *Williams v. Young*, 17 Cal. 403.

83. **Disclaimer.**—See *post*, "Judgment of nonsuit." No. 133.

84. **Answer in ejectment.**—See further, *ante*, § 46, Nos. 155-162.

85. **Statute of Limitations.**—The Statute of Limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. It, therefore, never runs in favor of the plaintiff, and the grantees of the plaintiff are in no better position. Their possession cannot be tacked on to that of the grantors, so as to render adverse the possession for the entire period subsequent to the sale.—Field, C. J., *McCracken v. City of San Francisco*, 16 Cal. 591.

86. To render possession adverse, so as to set the Statute of Limitation in motion, it must be accompanied with a claim of title, and this claim, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be "exclusive of any other right; and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declaration or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession under such circumstances is not adverse. *Id.*

87. An equitable action, to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the Statute of Limitations applicable to such actions. *City of Oakland v. Carpentier*, 13 Cal. 540.

88. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants plead possession in themselves, and the parties through whom they claim, for five years before the commencement of the action, on the fourth of March, 1860, but admitted the issuance of the patent on the nineteenth of February, 1856; *Held*, that the plea is of no avail, because the admission shows plaintiffs were seized of the premises within the five years. *Fremont v. Seals*, 18 Cal. 433.

89. In this State, the Statute of Limitations applies equally to actions at law and to suits in equity. It is directed to the subject matter, and not to the form of the action, or to the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. *Lord v. Morris*, 18 Cal. 432.

90. **Third persons.**—The "third persons," within the meaning of the fifteenth section of the Act of Congress, who can controvert the location of a

grant upon which a patent has issued, are those whose title to the premises patented not only accrued before the day of the Government, and its rights under the treaty attached, but those whose title to such premises was at that date such as to enable them to resist successfully any subsequent action of the Government affecting it. (*Leese v. Clark*, 18 Cal. 545.) And parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute such third persons; nor do parties who hold claims only upon the bounty of the Government; nor do intruders; nor even settlers having certificates of sale, unless the same ante-date the presentative of the claim of the patentee to the Board of Land Commissioners for California, to which period the patent takes effect by relation. *Waterman v. Smith*, 13 Cal. 374.

91. **When the Court may try the action without a jury.**—Failure of defendant in ejectment to appear when the cause is called for trial, an answer being in, authorizes the Court to try without a jury. *Doll v. Feller*, 16 Cal. 432.

92. After a judgment by default in ejectment a jury trial cannot be awarded, there being no issue. *Smith v. Billett*, 15 Cal. 23.

93. **Legal and equitable defenses should not be submitted to a jury together.**—The equitable defense should be first passed upon by the Court; and it is irregular to submit to the jury all the legal and equitable defenses together. *Lestrade v. Barth*, 19 Cal. 660.

94. In this case, although the matter constituting the equitable defense was submitted to the jury, and a general verdict rendered for defendant, yet as no objection was raised to this course of proceeding, either in the Court below or here, the irregularity was not considered in the determination of the appeal. *Id.*

95. Where, to an action of ejectment, several defenses are set up, some legal and some equitable, it is error for the Court to frame special issues involving these various defenses—legal and equitable—and submit them all together to the jury. *Weber v. Marshall*, 19 Cal. 447.

96. A jury need not be called to pass upon an equitable defense to an action of ejectment. The parties are entitled to a jury upon the legal issues; but as to the equitable defenses, the Court sits as a Chancellor, and may or may not, according to its discretion, order issues to a jury. *Id.*

97. **Equitable defenses to be passed upon first.**—The equitable defense is first to be passed upon by the Court, and until it is disposed of, the assertion of the legal remedy is in effect stayed. Upon the determination of the Court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result. *Estrade v. Murphy*, 19 Cal. 248.

98. Where an equitable defense is set up to an action of ejectment, the defendant becomes an actor with respect to the matter presented by him, and his answer must contain the essential averments of a bill in equity. The defense must meet the present claim of the plaintiff to the possession; and in order that an equitable defense may avail, the equity presented must be of such a character that it may be ripened, by the decree of the Court, into a legal right to the premises, or such as will estop the prosecution of the action. *Lestrade v. Barth*, 19 Cal. 660.

99. When an equitable defense is interposed to an action of ejectment, the Court should first pass upon the merits of said defense, as according to the determination of it the proceeding with the action at law will depend. *Id.*

100. Where, in ejectment, plaintiff and defendant deraigned title from one Bennett, who died in August, 1849—plaintiff claiming by deed from Bennett's heirs, and defendant by deed to his grantors from Bennett himself in March, 1849, which latter conveyance misdescribed the premises—and defendant set up in his answer as an equitable defense this sale of Bennett's to defendant's grantors prior to Bennett's death, the mistake in the description and knowledge of the sale, and the mistake on the part of plaintiff when he purchased from the heirs: *Held*, that the defense was good, and that the necessary parties were before the Court; that in a direct suit brought by defendant to have this mistake corrected, and a deed made to him, plaintiff only (and not the heirs of Bennett) would be a necessary party. *Id.*

101. In this case, had the equitable defense been first passed on, the Court would have decreed a conveyance by plaintiff to defendant, and also an injunction against the further prosecution of the action. *Id.*



102. *Arguello v. Edinger*, (10 Cal. 159) that where a defense arising from a verbal contract for the sale of the land, accompanied with acts of part performance, is set up to an action of ejectment, the Court must first pass upon this defense; and if, on hearing the evidence, the Court determines the defense to be good, it should enjoin the further prosecution of the action, with its decree for a specific performance; and on the other hand, if the Court refuse the relief claimed by defendant, it should call a jury to determine the issue upon the general denial, affirmed. *Weber v. Marshall*, 19 Cal. 447.

103. **Evidence, general rules.**—The presumption under our statute is, that all land in the State is public land, until the legal title is shown to have passed from the Government to private parties. *Burage v. Smith*, 14 Cal. 380.

104. Parties in possession of land, claiming title thereto, are presumed to be the owners thereof. *Sac. V. R. R. Co. v. Moffatt*, 7 Cal. 577.

105. Where two parties rely upon possession solely as proof of title, the presumption of ownership is in favor of the first possessor; and proof of possession, however short, will entitle a claimant to recover, unless the defendant can account for such possession, or show a prior possession or title in himself or a third person. *Potter v. Knowles*, 5 Cal. 87.

106. It is a very convenient rule, in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant from the Government of mines, water privileges and the like, to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Boggs v. Merced Mining Co.*, 14 Cal. 279.

107. The rule of the common law, as to the necessity of proof in ejectment of a legal estate and a right of entry in the plaintiff at the date of the demise laid in the declaration, has no application under our system. *Yount v. Howell*, 14 Cal. 465.

108. On the trial in ejectment, plaintiff can rest his case, in the first instance, upon proof of his seizure and of the possession by defendants. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in the defendants. *Payne and Dewey v. Treadwell*, 16 Cal. 220.

109. Where, in ejectment, the ouster was alleged to have taken place in June, 1856, while the title of plaintiff was alleged to have accrued only in May, 1859: *Held*, that if this were not a clerical error, it is a defect which cannot be taken advantage of after verdict. *Coryell v. Cain*, 16 Cal. 567.

110. Under the allegation of ouster, a holding over by the defendant may be shown. *Garrison v. Sampson*, 15 Cal. 93. And ouster is only material when the question of mesne profits is involved. *Yount v. Howell*, 14 Cal. 465.

111. Where a party in ejectment relies upon documentary evidence of title and prior possession, if he fail in the former, he may still rely upon the latter. The failure to prove the paper title does not impair the just force and effect of the possession. *Morton v. Folger*, 15 Cal. 275.

112. Under an allegation of seizin in fee of the premises, plaintiff may recover, if he show any interest entitling him to possession. *Stark v. Barrett*, 15 Cal. 361.

113. The fact that a complaint in ejectment, in addition to describing the premises by metes and bounds, also designates them as one-half of a certain preemption claim taken up by one Morris—from whom plaintiffs traced title—in 1850, and surveyed by the County Surveyor, and recorded in conformity with the statute, does not make it essential to plaintiffs' recovery, as against a defendant in possession, that they should allege in their complaint, and on the trial prove, such facts as will bring them within the provisions of the Preemption Laws of the United States, or the Possessory Act of this State. The designation of the property as part of a preemption claim does not preclude the claimants from relying upon any other source of title than the United States or the State. *Coryell v. Cain*, 16 Cal. 567.

114. The general rule that, in ejectment, the claimant must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that his action will be defeated if defendant shows title out of him, and in a third party, has in this State been qualified and limited. *Id.*

115. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least, in substance, and

he cannot, against defendant's objection, recover on another and different title. *Eagan v. Delaney*, 16 Cal. 85.

116. Where plaintiff claimed possession by virtue of his own possession, and also under C., who had formerly been in the actual possession of the premises, the defendants, under a general denial of the allegations of the complaint, cannot show title in a third person under whom they do not claim. *Piercy v. Sabin*, 10 Cal. 30.

117. In ejectment, brought solely on the prior actual possession of the plaintiff, the defendant being a mere trespasser, the latter cannot justify his act by showing the true title to be outstanding in a third person. *Bird v. Lisbro*, 9 Cal. 1; *Plume v. Seaward*, 4 Id. 94.

118. But where the plaintiff does not rely on prior possession, but on strict title, the defendant in possession, having a good, *prima facie* right, may set up and show the true title to be in another. *Id.*

119. **Abandonment.**—Title by possession may be destroyed by proof by the defendant of abandonment by plaintiff, or by his grantors. *Id.*

120. The law will not presume an abandonment from the lapse of time. *Patridge v. McKinney*, 10 Cal. 183.

121. But lapse of time constitutes a material element to be considered in deciding the question of abandonment. *Lawrence v. Fulton*, 19 Cal. 683.

122. Abandonment must be made by the owner, without being pressed by any duty, necessity or utility to himself, but simply because he desires no longer to possess the thing; and further, it must be made without any desire that any other person shall acquire the same. (*Stephens v. Mansfield*, 11 Cal. 363.) *Query*: Whether a party can destroy the evidence of his possession, which has been continued for a period corresponding with the Statute of Limitations, by simple abandonment. *Bird v. Lisbro*, 9 Cal. 5.

123. **Damages, rents and profits.**—The damages which a plaintiff can recover in an action of ejectment for the use and occupation of the premises, are such as arise subsequent to the accruing of his right of possession; and when his right depends upon a Sheriff's deed he cannot recover, in this form of action, for the use and occupation for the six months intervening the sale and the execution of the deed. *Clark v. Boyreau*, 14 Cal. 634.

124. Such profits, when claimed in the ejectment suit, are limited to such as accrue subsequent to the ouster alleged; or in other words, the occupation of the defendant. When they are claimed in an independent suit, the record of recovery in the ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had. *Yount v. Howell*, 14 Cal. 465.

125. Other facts necessary to recover mesne profits must be shown by evidence *aliunde*. *Id.*

126. Where damages are claimed for use and occupation prior to the commencement of the action, the complaint must state the title of plaintiff as existing at some prior date, (to be designated) and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title. *Payne and Dewey v. Treadwell*, 16 Cal. 220.

127. In ejectment the complaint, verified, alleged ownership in plaintiffs, possession by defendants of the premises from a designated period, and the withholding of that possession from plaintiff from that period, and that the value of the use and occupation, rents and profits of the premises during such possession was \$10,000; the answer contained no specific denial of these allegations, and under directions of the Court, plaintiffs had verdict and judgment on the pleadings for \$10,000 damages: *Held*, that the verdict and judgment must stand; and that the claim for damages resting entirely upon the uncontroverted allegations of the complaint, the Court below erred in granting a new trial, unless plaintiffs should remit all the damages except one dollar. *Patterson v. Ely*, 19 Cal. 28.

128. **Improvements, when may be set off.**

129. Where the defendant in ejectment occupied and improved the land *bona fide*, under color of title, the improvements made by him *before the commencement of the suit* constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 511.

130. In ejectment the value of improvements, even where defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 466. See *post*, § 257.

131. **Verdict and finding.**—Where several defendants in ejectment unite in an answer amounting to a general denial, a joint verdict is proper, though the answer concludes with a prayer for separate verdicts. To entitle defendants to separate verdicts, they should set forth with specific description the parcels which they severally occupy or claim, and thus direct the attention of plaintiff to the course of defense upon which they will separately insist. *Patterson v. Ely*, 19 Cal. 28.

132. Courts may impose, as a condition of allowing a verdict to stand in other respects, the remission of damages in cases where there was no evidence on the subject of damages, or where the evidence was entirely incompetent, or where the Court differs from the jury as to the effect of the evidence. But where, as in this case, the verdict for the damages was based entirely upon an admission by the record, it must stand. The admission, if good for anything, is good for the entire amount specified. *Id.*

133. The finding of a jury based upon an admission of the parties by the pleadings or otherwise, is not less an assessment of damages than if the finding were made upon conflicting evidence. *Id.*

134. As the findings in this case—ejectment with an equitable defense imperfectly set up, tried by the Court—do not strictly find such facts as show defendant's equity as against plaintiff's claim, the judgment for plaintiff is affirmed. *Meador v. Parsons*, 19 Cal. 294; see title "Finding," § 180, Nos. 10, 32; also, § 175, No. 4.

135. **Judgment, extent and effect of.**—In an action of ejectment to recover possession of a large tract of land, where the defendant failed to appear, and the case was submitted to the Court, who found that plaintiff had title to the whole tract, and that the defendant was in possession of a part—sixty or seventy acres—of the tract without right: *Held*, that it was proper for the Court to enter judgment for the plaintiff for the possession of the whole tract. *Vullejo v. Fay*, 10 Cal. 377.

136. Under our system, the judgment in ejectment is only conclusive of two points: the right of possession in the plaintiff, and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 465.

137. It is otherwise at the common law; there, the proof of title being held strictly to the date of the demise laid, the judgment was conclusive of such title. *Id.*

138. A judgment in favor of plaintiff, even on the title, is conclusive, at most, of the title of plaintiff only, and not of his grantor. *Grady v. Early*, 18 Cal. 108.

139. In ejectment against several defendants occupying different portions of the property sued for, several judgments may be entered and at different times; and this, whether upon trial or on separate findings or verdicts, or on findings by the Court, or after default. *Lick v. Stockdale*, 18 Cal. 219.

140. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Id.*

141. **Nonsuit.**—It is error to refuse a nonsuit to such of the defendants as were not in the possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 270.

142. In ejectment, upon disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noe v. Card*, 14 Cal. 576.

143. **Interest.**—A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 8 Cal. 31.

144. **Juror, when incompetent.**—See § 162, No. 5.

§ 255. *When plaintiff shall not recover costs.*

If the defendant, in such action, disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

§ 256. *If plaintiff's title terminates pending the suits; what he may recover, and how verdict and judgment to be.*

In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property.

§ 257. *When value of improvements shall be allowed as a set-off.*

When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under cover of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

1. In ejectment, defendant cannot have his improvements set off against the mesne profits under section two hundred and fifty-seven of the Practice Act, where the improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse within that section. *Bay v. Pope*, 18 Cal. 694.

2. A defendant, who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation. *Kilburn v. Ritchie*, 2 Cal. 145.

3. Where the defendant in ejectment occupied and improved the land *bona fide*, under color of title, the improvements erected by him constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 165.

4. The provisions of the "Settler's Act" of 1856, requiring the party recovering in ejectment to pay the defendant the value of his improvements, it seems, are not in violation of the provision of the Federal Constitution, prohibiting States from passing laws impairing the obligation of contracts. All questions of property are within the jurisdiction of the respective States, and the individual members thereof, in forming a Government, are not considered as contractors with such Government, in the sense employed in the Constitution of the United States. *Billings v. Hall*, 7 Cal. 1.

5. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 465.

6. In an action of ejectment, where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property. 5 Cal. 319.

7. At common law, no allowance was ever made for improvements; and our Practice Act only permits it to the extent of being used as a set-off to the damages for withholding the property recovered. *Id.*

§ 258. *Who, when, and how an order may be made to allow a party to survey and measure the land in dispute.*

[1860.] The Court in which an action is pending for the recovery of real property, or a Judge thereof, or a County Judge, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property, and make survey and measurement thereof, for the purposes of the action.

§ 259. *Order, what to contain, and how served; if unnecessary injury done, the party surveying to be liable therefor.*

The order shall describe the property, and a copy thereof shall be served on the owner or occupant; and thereupon, such party may enter upon the property, with necessary surveyors and assistants, and may make such survey and measurements; but if any unnecessary injury be done to the property, he shall be liable therefor.

§ 260. *A mortgage shall not be deemed a conveyance, whatever its terms.*

A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

1. This takes from the instrument its common law character, and restricts it to the purposes of security. It does not, in terms, change the estates at law of the mortgagor and mortgagee; but, by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine upon a consideration of which this section was evidently drawn. *McMillan v. Richards*, 9 Cal. 365.

2. The two hundred and sixtieth section of our Practice Act changes this character of the instrument, and takes from the mortgagee all right to the possession, either before or after condition broken, and makes the mortgage a mere lien; but this section does not prevent the owner from making an independent contract for the possession, or from authorizing a sale of the premises, the mortgagee, consenting thereto, to pay the debt. *Fogarty v. Sawyer*, 17 Cal. 589.

3. The words "whatever its terms," in this section, were intended to control the terms of grant, bargain and sale, generally employed in mortgages, and do not relate to stipulations for possession or sale. *Id.*

§ 261. *When Court may grant injunction during foreclosure after sale on execution before conveyance.*

The Court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property

during the foreclosure of a mortgage thereon; or after a sale on execution before a conveyance.

1. This remedy is only preventive; it is not exclusive of any other remedy. *Sands v. Pfeiffer*, 10 Cal. 258.

2. The remedy by injunction to restrain the removal of fixtures, under section two hundred and sixty-one of the Practice Act, is only preventive; it is not exclusive of any other remedy. *Id.*

§ 262. *Damages may be recovered for injury to the possession after sale and before delivery of possession, who by.*

When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before possession is delivered under the conveyance.

§ 263. *Action not to be prejudiced by alienation, pending suit.*

An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

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#### CHAPTER IV.—*Actions for the partition of real property.*

SEC. 264. *Who may bring actions for partition.*

265. *Interests of all parties shall be set forth in the complaint.*

266. *Lien-holders not of record need not be made parties.*

267. *Plaintiff shall file notice of lis pendens.*

268. *Summons shall be directed to all persons interested in the property.*

269. *Unknown parties may be served by publication.*

270. *Answer of defendants, what to contain.*

271. *The rights of all parties may be ascertained in the action.*

272. *Repealed.*

273. *Lien-holders shall be made parties, or a referee be appointed to ascertain their rights.*

274. *Lien-holders shall be notified to appear before the referee appointed.*

- SEC. 275. *The Court may order a sale or partition, and appoint referees therefor.*
276. *Partition shall be made according to the rights of the parties as determined by the Court.*
277. *Referees shall make a report of their proceedings.*
278. *The Court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.*
279. *Judgment shall not affect tenants for years to the whole property.*
280. *Expenses of partition shall be apportioned among the parties.*
281. *A lien on an undivided interest of any party shall be a charge only on the share assigned to such party.*
282. *Estate for life or years may be set off in a part of the property not sold, when not all sold.*
283. *Application of proceeds of sale of encumbered property.*
284. *Party holding other securities may be required first to exhaust them.*
285. *Proceeds of sale, disposition of.*
286. *When paid into Court, the cause may be continued for the determination of the claims of the parties.*
287. *Sales by referees shall be made at public auction.*
288. *The Court shall direct the terms of sale or credit.*
289. *Referees may take securities for purchase money.*
290. *Tenants whose estate has been sold shall receive compensation.*
291. *The Court may fix such compensation.*
292. *The Court shall protect tenants unknown.*
293. *The Court shall ascertain and secure the value of future contingent or vested interests.*
294. *Terms of sale shall be made known at the time. Lots shall be sold separately.*
295. *Who may not be purchasers.*
296. *Referees shall make a report of the sale to the Court.*
297. *If confirmed, conveyances may be executed.*
298. *Proceeding if a lien-holder become a purchaser.*
299. *Conveyances shall be recorded, and will be a bar against parties.*

SEC. 300. *Proceeds of sale belonging to parties unknown shall be invested for their benefit.*

301. *Investment shall be made in the name of the Clerk of the county.*

302. *When the interests of the parties are ascertained, securities shall be taken in their names.*

303. *Duties of the Clerk making investments.*

304. *When unequal partition is ordered, compensation may be adjudged in certain cases.*

305. *The share of an infant may be paid to his guardian.*

306. *The guardian of an insane person may receive the proceeds of such party's interest.*

307. *A guardian may consent to partition without action, and execute releases.*

308. *Costs of partition a lien upon the shares of the par-ceners.*

309. *The Court by consent may appoint a single referee.*

§ 264. *Who may bring actions for partition.*

[1854.] When several persons hold and are in possession of

Sec. 364. When several co-tenants hold and are in possession of real property as par-ceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

1. The right of partition existing in the cotenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him. *Stark v. Barrett*, 15 Cal. 361.

2. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. *State of California v. Poulterer*, 16 Cal. 514.

3. Two corporations cannot hold land together as joint tenants. *De Witt v. City of San Francisco*, 2 Cal. 289.

§ 265. *The interests of all parties shall be set forth in the complaint.*

The interests of all such persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if



one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

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Sec. 266. *Liens held by persons having a conveyance made a party to the action unless such liens appear of record.*

Sec. 267. *Immediately after the filing in the District Court the plaintiff shall cause to be filed with the Recorder of the county or of the severality in which the property is situated, either a complaint or a notice of the pendency containing the names of the parties, the object of the action and a description of the property to be affected thereby. From the time it shall be deemed notice to all persons.*

*Word need not be made parties.*

*any liens upon the property, by the plaintiff, need be made parties to the action, if they appear of record.*

*So notice of lis pendens.*

Immediately after filing the complaint, the plaintiff shall file with the Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

1. A purchaser of real property, pending suit affecting the title to it, is not bound by the judgment, unless notice of *lis pendens* be filed with the County Recorder before the purchase. *Richardson v. White*, 18 Cal. 102.

2. Query: Whether actual notice of *lis pendens* would be equivalent to notice filed with the Recorder? *Id.*

§ 268. *Summons shall be directed to all persons interested in the property.*

The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property.

1. Two corporations cannot hold land together as joint tenants. *De Witt v. City of San Francisco*, 2 Cal. 289.

§ 269. *Unknown parties may be served by publication.*

If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons

may be served on such absent or unknown party, by publication, as in other cases. When publication is made, the summons, as published, shall be accompanied by a brief description of the property which is the subject of the action.

See § 31.

§ 270. *Answer of defendants, what to contain.*

The defendants who have been personally served with the summons and a copy of the complaint, shall set forth in their answer the nature and extent of their interest in the property; and if such defendants claim a lien upon the property by mortgage, judgment or otherwise, they shall state the original amount and date of the same, and the true sum remaining due thereon; also, whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they shall be deemed to have waived their right to such lien. If the defendant has been secured in any other way or not; and if secured, the extent and nature of the security; or they shall be deemed to have waived their right to such lien.

1. Guardians *ad litem*, appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate. *Waterman v. Lawrence*, 19 Cal. 210.
2. The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the Court has no jurisdiction, except over the matter of partition. *Id.*

§ 271. *The rights of all parties may be ascertained in the action.*

The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the Court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

§ 272. [1862.] *Repealed.*

Sec. 272. Whenever from any cause it shall have become, in the opinion of the Court, impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, it shall be lawful for the Court to first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon to divide and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest and the only parties to the action, and thereafter to proceed in like manner to ~~divide~~ and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to

§ 273. *Lien-holders shall be made parties, or a referee be appointed to ascertain their rights.*

[1862.] *If it shall appear to the Court, by the certificate of the County Recorder, or County Clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or incumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of said action, and the persons holding such liens are not made parties to the action, the Court shall either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or incumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or incumbrances severally held by the said persons and the parties to the said action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.*

§ 274. *Lien-holders shall be notified to appear before the referee appointed.*

The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the Court, in such manner as may be proper. The report of the referee thereon shall be made to the Court, and shall be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

§ 275. *The Court may order a sale or partition and appoint referees therefor.*

If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the Court, that the property, or any

part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the Court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained.

See § 309.

§ 276. *Partition shall be made according to the rights of the parties as determined by the Court.*

Sec. 276. In making the partition the referees shall divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the Court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

Referees shall divide the property, thereof to the respective parties, considered, according to the respect- mined by the Court, designating the several portions by proper landmarks; and may employ a surveyor, with the necessary assistants, to aid them therein.

§ 277. *Referees shall make a report of their proceedings.*

The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

1. If in a partition action the plaintiff omit to file any of the papers necessary to the judgment, they may be allowed to file them *nunc pro tunc*, and the purchaser is not compellable to take title until they are so filed. *Waring v. Waring*, 472.

§ 278. *The Court may set aside or affirm the report and enter*

Sec. 278. If no exceptions be filed to the report, or upon hearing should be overruled, the Court shall confirm the same; or it may, upon exceptions, change, modify, or set it aside, and refer the matter to the same, or if necessary may appoint new referees. Upon the report, as confirmed, a final judgment ~~as above~~ shall be rendered to the effect that such partition be effectual and valid forever, which judgment ~~as above~~ shall be binding and conclusive: First—On all persons named in the complaint as parties to the action, or who shall have appeared therein, and their legal representatives who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the termination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life; Second—On all persons interested in the property who may be unknown, to whom notice shall have been given of the action by publication; Third—On all persons claiming from such parties or persons, or either of them; and to that end the action shall be deemed and is hereby declared to be a proceeding *in rem*. A copy of the report of the referee as confirmed, together with a copy of the final judgment ~~as above~~ therein rendered, duly certified, may be filed in the office of the County Recorder of the county or counties in which the land is situated, whose duty it shall be to record the same, which filing and recording shall have the same force and effect as the filing and recording of a deed of conveyance; and Fourth—All persons who have or claim to have conveyances to, liens upon, or any interest in the property, where such conveyances, liens or interest did not appear of record at the time of the commencement of the

It be conclusive.

the report, and if necessary, report being confirmed, judgment shall be effectual forever; which isive:

es to the action, and their legal e any interest in the property rs in fee, or as tenants for life reversion, remainder, or the y part thereof, after the termin- and who, by any contingency, st in the property, or who have

an interest in any undivided share thereof, as tenants for years or for life;

2d. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the action for partition by publication; and,

3d. On all other persons claiming from such parties or persons, or either of them.

§ 279. *Judgment shall not affect tenants for years to the whole property.*

But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

§ 280. *Expenses of partition shall be apportioned among the parties.*

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Sec. 381. The expenses of the referees, including those of a surveyor and assistant or assistants when employed, shall be ascertained and allowed by the Court, and the amount thereof, together with the fees allowed by the Court in its discretion to the referees, shall be apportioned among the different parties to the action equally by law to the referees, ~~shall be apportioned~~ among those of a surveyor and ascertained and allowed by together with the fees allowed apportioned among the different parties to the action.

1. One of several heirs who maintains proceedings for the protection of the estate, on the promises of others to share the expense, does not acquire thereby a lien for disbursements so incurred against their interests in the estate, which can be recognized in his action for partition. *Bulen v. Burdell*, 11 Abb. Pr. 381.

§ 281. *A lien on an undivided interest of any party shall be a charge only on the share assigned to such party.*

When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

§ 282. *Estate for life or years may be set off in a part of the property not sold, when not all sold.*

When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

§ 283. *Application of proceeds of sale of encumbered property.*

The proceeds of the sale of the encumbered property shall be applied, under the direction of the Court, as follows :

- 1st. To pay its just proportion of the general costs of the action ;
- 2d. To pay the costs of the reference ;
- 3d. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due ; the amount due to be verified by affidavit at the time of payment ;
- 4th. The residue among the owners of the property sold, according to their respective shares therein.

§ 284. *Party holding other securities may be required first to exhaust them.*

Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the Court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

§ 285. *Proceeds of sale, disposition of.*

The proceeds of sale and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the Court so directs. But in case no direction be given, all such proceeds and securities shall be paid into Court, or deposited therein, or as directed by the Court.

§ 286. *When paid into Court, the cause may be continued for the determination of the claims of the parties.*

When the proceeds of sales of any shares or parcels belonging to persons who are parties to the action, and who are known, are paid into Court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the Court. Further testimony may be taken in Court, or by a referee, at the discretion of the Court, and the Court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original action.

§ 287. *Sales by referees shall be made at public auction.*

All sales of real property, made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state the terms of sale; and if the property, or any part of it, is to be sold subject to a prior estate, charge or lien, that shall be stated in the notice.

§ 288. *The Court shall direct the terms of sale or credit.*

The Court shall, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties out of the State.

§ 289. *Referees may take securities for purchase money.*

[1854.] The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money of such parts of the property as are directed by the Court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the Clerk of the county and his successors in office.

§ 290. *Tenants whose estate has been sold shall receive compensation.*

The person entitled to a tenancy for life or years, whose estate shall have been sold, shall be entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the Clerk of the Court. Upon the filing of such consent, the Clerk shall enter the same in the minutes of the Court.

§ 291. *The Court may fix such compensation.*

If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the

Court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and shall order the same to be paid to such party, or deposited in Court for him, as the case may require.

§ 292. *The Court shall protect tenants unknown.*

If the persons entitled to such estate for life or years be unknown, the Court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

§ 293. *The Court shall ascertain and secure the value of future contingent or vested interests.*

In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the Court shall ascertain and settle the proportional value of such contingent or vested right or estate, and shall direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

§ 294. *Terms of sale shall be made known at the time. Lots shall be sold separately.*

In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

§ 295. *Who may not be purchasers.*

Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void.

§ 296. *Referees shall make a report of the sale to the Court.*

After completing a sale of the property, or any part thereof ordered to be sold, the referees shall report the same to the Court,



with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any, taken. The report shall be filed in the office of the Clerk of the county where the property is situated.

§ 297. *If confirmed, conveyances may be executed.*

If the sale be confirmed by the Court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

§ 298. *Proceeding if a lien-holder become a purchaser.*

When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

§ 299. *Conveyances shall be recorded, and will be a bar against parties.*

The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons had been served by publication, and against all persons claiming from them, or either of them.

§ 300. *Proceeds of sale belonging to parties unknown shall be invested for their benefit.*

When there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

§ 301. *Investment shall be in the name of the Clerk of the county.*

When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except

as herein otherwise provided, in the name of the Clerk of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the Court.

§ 302. *When the interests of the parties are ascertained, securities shall be taken in their names.*

When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the Court, such securities shall be taken in the names of, and payable to, the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the Clerk.

§ 303. *Duties of the Clerk making investments.*

The Clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the Court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose, in the Clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

§ 304. *When unequal partition is ordered, compensation may be adjudged in certain cases.*

sec. 304. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the Court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it shall appear that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases the Court shall have power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.

purpose, and that his interest will be promoted thereby.

§ 305. *The share of an infant may be paid to his guardian.*

When the share of an infant is sold, the proceeds of the sale may be paid, by the referee making the sale, to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the Court.

§ 306. *The guardian of an insane person may receive the proceeds of such party's interest.*

The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking approved by a Judge of the Court, or by a County Judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

§ 307. *A guardian may consent to partition without action, and execute releases.*

The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the Court.

§ 308. *Costs of partition a lien upon the shares of the parteners.*

The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judg-

ment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto, or any of them.

§ 309. *The Court by consent may appoint a single referee.*

The Court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, shall have all the powers and perform all the duties required of the three referees.

See Gray's New York Practice, Special Proceedings.

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CHAPTER V.—*Actions for the usurpation of an office or franchise.*

SEC. 310. *Action may be brought against any party usurping, etc., any office or franchise.*

311. *Name of person entitled to office may be set forth in the complaint; if fees have been received by the usurper, he may be arrested.*

312. *Judgment may determine the rights of both incumbent and claimant.*

313. *When rendered in favor of applicant.*

314. *Damages may be recovered by successful applicant.*

315. *When several persons claim the same office, their rights may be determined by a single action.*

316. *If defendant found guilty, what judgment to be rendered against him.*

§ 310. *Action may be brought against any party usurping, etc., any office or franchise.*

An action may be brought by the Attorney General in the name of the people of this State, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. And it shall be the duty of the Attorney General to bring the action whenever he has

reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the Governor.

1. **Generally.**—This writ is to prevent the usurpation of any office, franchise or liberty, as also to afford a remedy against corporations for a violation of their charters, tending to a forfeiture thereof. *Ex parte the Attorney General*, 1 Cal. 87.

2. The Code provides a remedy against any person who usurps, intrudes into, or unlawfully holds or receives any public office, civil or military, or any franchise in the State. *People v. Olds*, 3 Cal. 175.

3. The distinction between writs of mandate and *quo warranto*, as held in England, is not abolished by the statutes of this State, but is fully recognized. *Id.* 177.

4. An information in the nature of a *quo warranto* is the proper proceeding to try the title to an office. *People v. Scannell*, 7 Cal. 439.

5. *Quo warranto* lies to test the right of an appointee of the Board of Pilot Commissioners. *Palmer v. Woodbury*, 14 Cal. 43.

6. A person holding a certificate of election without the right and legal title to the office, is an intruder within the meaning of the act. *People ex Wm. Wilkes v. Jones*, 20 Cal.

7. The real right or title to the office comes from the will of the voters as expressed at the election. If the office was in fact given by the voters to another, the possession by the defendant of the certificate affords him, at most, but a color of title, and does not invest him with the right which belongs to another. *Id.*

8. A certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by *quo warranto*. *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

9. Such certificate is only *prima facie* evidence of title to the office, not conclusive. Nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be established, not only without, but against the evidence of the certificate. *Magee v. Supervisors of Calaveras Co.*, 10 Cal. 376.

10. **Who has jurisdiction to grant the writ.**—On petition of the Attorney General for a writ of *quo warranto* against a Tax Collector: *Held*, that the Court had no jurisdiction, and the prayer of the petition was denied. *The Attorney General ex parte*, 1 Cal. 85.

11. This Court is strictly an appellate tribunal, and has no original jurisdiction except in cases of *habeas corpus*, and consequently is not empowered to issue a writ of *quo warranto* for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax. *Id.*

12. The act giving jurisdiction over the subject of contested elections to the Judge of the County Court, is constitutional, and District Judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 145.

13. This is one of the "special cases," of which the Constitution provides that the County Judge may take cognizance when authorized by the Legislature. *Id.*

14. **Judicial officers.**—The Sheriff is not a judicial officer. And though the offices of Sheriff and Tax Collector are distinct by the Constitution, yet they may be united in the same hands. *Attorney General v. Squires*, 14 Cal. 12.

15. It seems the office of Sheriff and Tax Collector are constitutional offices. *Id.*

16. **Who are eligible to office.**—On the sixteenth day of August, 1857, A received from the President of the United States a commission of Surveyor General for the State of California. At a general election held on the third day of September, 1857, A and B were candidates for the office of State Controller of the State of California; A received the highest number of votes, but never qualified or claimed the office. On the sixth day of September, 1857, A gave bond and took the oath of office under the commission as Surveyor General, and on the ninth day of the same month entered upon the duties of such office, and on the fifteenth notified the President of his acceptance of the same: *Held*, that A was eligible to the State office when the votes were cast for him, and was duly elected thereto. *The People ex rel. Meloney v. Whitman*, 10 Cal. 38.

17. **Vacancy, what constitutes.**—The Constitution itself clearly defines the sense of the phrase "vacancy of the office of Governor," as used in the sixth section, by specifically enumerating in the succeeding section the instances which devolve, in the duties of the Executive, upon the Lieutenant Governor. *Id.*

18. The failure on the part of the Controller elect to qualify, creates no vacancy in the office. *Id.*

19. When the Constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious results. *Id.*

20. In determining upon the sufficiency of the bond of an officer, and whether the officer, by his failure to comply with the requisition of the Supervisors to file a new bond, has vacated his office, the Supervisors exercise powers of a judicial character. *People v. Supervisors of Marin County*, 10 Cal. 344.

21. The provision of the statute organizing Boards of Supervisors, which empowers them to "require new bonds of any county or township officer, with additional securities *whenever they deem the same necessary*," does not leave the exercise of the power to their arbitrary discretion. By the terms "*whenever they deem the same necessary*," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is a necessity for further security. *Id.*

22. An order of the Supervisors requiring a new bond of an officer, should specify the ground upon which the order is made; and where the Supervisors of Marin county made an order as follows: "Ordered, by the Board of Supervisors, that John De Fries, Constable of San Rafael township, file another bond, with two or more sufficient sureties, within fifteen days:" *Held*, that the order was fatally defective. *Id.*

23. The power to declare an office vacant is vested, under the statute, where the duty to approve of the bond of the officer is lodged. That duty is imposed upon the County Judge, and not the Supervisors; and where the Supervisors of Marin county declared the office of Constable vacant, because the Constable failed to comply with their order to file a bond: *Held*, that they exceeded their jurisdiction. *Id.*

24. **Election, time.**—An ordinance was passed by the Board of Supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the Board should appoint a person to superintend the cemetery "annually, in October, who shall hold office for the term of one year," and further, that the Board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858; had held the office until December, 1859, the Board having failed to appoint his successor before that time, when relator was appointed: *Held*, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *Jacobs v. Murray*, 15 Cal. 221.

25. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *Id.*

26. Where an election for the office of District Judge was held by the qualified electors of such district at the general election in 1858, and the term of the present incumbent of that office does not expire until January, 1861: *Held*, that such election was unauthorized, and the person elected is not entitled to a commission to such office. *People ex rel. Brodie v. Weller*, 11 Cal. 77.

27. The statute, so far as it affects the election of 1858, only applies to such offices as were to become vacant in January, 1859, and this is evident as well as by the terms of the act as the unreasonableness of supposing that the Legislature meant to authorize an election several years in advance of the time when the office was to be filled. *Id.*

28. An election cannot take place under the Constitution without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power, and through legislative enactments; and the Legislature must provide for and regulate the conduct of an election, or there can be none. *People ex rel. McKune v. Weller*, 11 Cal. 49.

29. **When proclamation necessary.**—An election to fill a vacancy

caused by a resignation is a special election, and the Governor's proclamation is essential to its validity. *Westbrook v. Roeborough*, 14 Cal. 180.

30. The office of County Judge is not a "county office," within the meaning of the Act entitled "An Act to amend an Act to Regulate Elections," passed March 23d, 1850; consequently, the Board of Supervisors cannot order a special election to fill a vacancy in that office. *People ex rel. v. Martin*, 12 Cal. 409.

31. An election to fill a vacancy in the office of District Judge is invalid, unless made under and in pursuance of the proclamation of the Governor. *People ex rel. McKune v. Weller*, 11 Cal. 49.

32. The statute requiring the Governor to issue his proclamation of election to fill vacancies in certain offices is mandatory, and an essential prerequisite to all such elections. *Id.*

33. The object of the proclamation is to give notice to the electors that such an election will be held. *Id.*

34. F. was elected, in the month of May, 1857, County Judge of San Mateo county, in pursuance of the provisions of "An Act to Organize and Establish the County of San Mateo." No proclamation of the Governor was issued calling this election. At the general election in 1858, in pursuance of the proclamation of the Governor, an election was held for the same office and T. was elected: *Held*, that F. was entitled to the office. *People ex rel. Fox v. Templeton*, 12 Cal. 394.

35. The function of the proclamation is not to proclaim the law, but the fact of the vacancy. It cannot change either the law or the Constitution. *People ex rel. Attorney General v. Burbank*, 12 Cal. 378.

36. **What will vitiate an election.**—The provisions of our statute clearly indicate that the Legislature did not mean that the returns of a candidate should be set aside, where an election was held at the proper time and place, and for the proper officers, unless it affirmatively appeared that there was such irregularity as affected the result of the election. *Whipley v. McKune*, 12 Cal. 352.

37. The failure of the officers conducting an election in a given district to be sworn as the election laws provide, will not invalidate the entire election without reference to its influence on the general result. *Id.*

38. The fact that the ballot-box was temporarily out of the possession of the officers of the election will not invalidate the election, especially where no fraud, collusion, or suspicious circumstances are shown. *Id.*

39. The rule is well settled, that the mere receiving and counting votes, improperly given, will not invalidate an election. *Id.*

40. Where such irregularities have occurred, it rests with the contestant to show them. The returns are *prima facie* evidence of the fact they import; and the returned candidate, after being commissioned, is *prima facie* entitled to the office. *Id.*

41. **What is a lucrative office.**—The place of Pilot in the port of San Francisco is an office. *Palmer v. Woodbury*, 14 Cal. 43.

42. **Query:** Whether the place or employment of Inspector of Customs is a lucrative office, under the United States, within the Constitution of this State. *Saunders v. Haynes*, 13 Cal. 145.

43. The Federal office of Surveyor General is a "lucrative office," and the office of Controller of State an "office of profit," under the twenty-first section of the fourth article of the Constitution of this State. *People ex rel. Meloney v. Whitman*, 10 Cal. 38.

44. **Holding office, what constitutes.**—To constitute the "holding" of an office, within the meaning of the Constitution, there must be the concurrence of two wills—that of the appointing power, and that of the person appointed. *Id.*

45. It is only in cases where there is no incumbent to hold over that the law will allow the appointment of the Executive to fill the office. *Id.*

46. As regards the appointing power, the appointment is complete when the commission is duly issued by the President, but the person appointed is required to give bond and take the oath of office before he can possess the office. These acts constitute a condition precedent to the holding of the office. *Id.*

47. **Term of office.**—At the general election held in Yuba county in September, 1855, W. was elected County Treasurer of that county for two years from the date of his election, and until his successor was chosen and qualified. On the

twenty-eighth day of April, 1857, a special act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh of May, 1857, W. resigned, and S. P. W. was appointed by the Board of Supervisors in his stead. At the general election in September, 1857, F. received the majority of votes for that office for the unexpired term of W., and claimed the office: *Held*, that the appointee held for the balance of the extended term, and that there was no vacancy to be filled at the election in September, 1857. *People ex rel. Fowler v. Wells*, 11 Cal. 329.

48. By the Constitution, Judges of the County Court hold their offices, when elected, for four years. It is in the power of the Legislature in organizing, or after organizing, a new county, to prescribe the time of elections for county officers, and also the period of the commencement of their terms; but it is not competent for the Legislature to change the period of the tenure of the office of Judge of County Courts, any more than to change those of Supreme and District Judges. It is evident, from the terms of this act, that it was contemplated that these officers—the Judge among them—should enter upon their offices as soon as the election was announced, or within a reasonable time thereafter. *People ex rel. Templeton*, 12 Cal. 394.

49. The Constitution, though it fixes the period of the tenure of the office of District Judge, does not fix any day for the commencement of the term; and if it did, it would not follow that it applies to Judges afterwards elected to new districts, nor would it result that the Judge elected in consequence of a vacancy was necessarily elected to fill such vacancy. *People ex rel. Attorney General v. Burbank*, 12 Cal. 378.

50. The Legislature can direct the time and prescribe the mode of electing District Judges, but cannot change the tenure of the office; hence, so much of the act as limited the period of incumbency is void. *Id.*

51. When the Constitution says the Judge shall hold his office for six years, it means that this period of six years is the term of his office; it is that *quantum* of time assigned to him by the Constitution as his period of the enjoyment of the office, and this *quantum* may not improperly be called a term. *Id.*

52. All the Constitution means by the expression "during the term," as used in sections fifteen and sixteen of article sixth, is during the time or period for which the officer is elected. *Id.*

53. The Constitution affixes no period of tenure to the office of Tax Collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The Legislature may direct how it shall be filled, and how its duties shall be discharged. *Attorney General v. Squires*, 14 Cal. 12.

54. Where the appointment to an office is vested in the Governor with the advice and consent of the Senate, and the term of the incumbent expires during the recess of the Senate, the Governor has the right to fill such vacancy, and his appointment vests in the appointee the right to hold and discharge the duties of such office for the full term, subject only to be defeated by the nonconcurrence of the Senate. *People ex rel. Attorney General v. Addison*, 10 Cal. 1.

55. The period of the tenure of a County Judge is fixed by the Constitution at four years. The Legislature may fix the commencement of the term, as also the time of election. *Westbrook v. Rosborough*, 14 Cal. 180.

56. If the incumbent resigns before the expiration of his term, there is a vacancy to be filled by the Governor. His appointee would hold until the next general election, or at most, until the qualification of the person elected by the people. *Westbrook v. Rosborough*, 14 Cal. 180.

57. Where an act, organizing a county, provides for the election of a County Judge, and limits the period of tenure to two years, the act is void, *pro tanto*; but the election held under the act is good, and entitles the incumbent to the office for four years. *Id.*

58. The full term of office of Judge Norton, of the Twelfth District Court, commenced with his qualification, January 2d, 1855, and expired six years thereafter; and the only election at which his successor could be elected was the general election in November, 1860. *Brodie v. Campbell*, 17 Cal. 11.

59. The appointee of the Governor to the office of County Judge will hold, over a person elected to the same office at a special election ordered by the Board of Supervisors of the county. *People ex rel. Attorney General v. Martin*, 12 Cal. 409.



60. By the provisions of the Constitution, the manner of electing and the term of the office of Comptroller are the same as that of Governor; and, consequently, if the Comptroller elect fails to qualify, the incumbent holds over until his successor is elected and qualified. *The People ex rel. Meloney v. Whitman*, 10 Cal. 38.

61. The term of the office of Governor is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years. *Id.*

62. The present incumbent of the office of Comptroller is entitled to hold the office until his successor is elected and qualified; and such successor may be elected at the general election of 1856, and when qualified, will hold his office for the term of two years and until his successor is qualified. *Id.*

63. From the time of the assumption of the office, the term of the Judge elected would legally commence, and terminate at the expiration of four years from that time. *People ex rel. Fox v. Templeton*, 12 Cal. 394.

64. A person duly elected Judge of the District Court of this State is entitled to hold office for the period of six years. *People ex rel. Brodie v. Weller*, 11 Cal. 77.

65. **Who may appoint to office.**—An Act of the Legislature, authorizing Boards of Supervisors to appoint a Collector of foreign miners' licenses is not unconstitutional. Assessors and Tax Collectors are constitutional officers; but it is not necessary, under the thirteenth section of article eleven of the Constitution, that every portion of the revenue pass through their hands. The Legislature may authorize the tax-payer to pay his taxes directly into the treasury. *Attorney General v. Squires*, 14 Cal. 12.

66. The Sheriff being *ex officio* Tax Collector of foreign miners' licenses by an Act of the Legislature, may be deprived of the office of Tax Collector before the expiration of his term. *Id.*

67. The Legislature, having vested certain duties in a public officer, for whose services compensation is allowed, may take those duties and the fees from the office, before the expiration of the term, and confer them upon another officer. *Id.*

68. *Smith v. Stillman*, decided in 1852, (not reported) to the effect that after the Legislature has created an office, contemplated or provided for by the Constitution, it cannot destroy the office of the incumbent during his term, overruled. *Id.*

69. No appointing power in this State can determine conclusively upon the capacity of the appointee to hold office. That question may be examined in the Courts. *Palmer v. Woodbury*, 14 Cal. 43.

70. The Board of Pilot Commissioners under the Act of 1854, as amended by the Act of 1855, have only the powers conferred by the act, and must appoint the pilots from the classes of persons named therein. They cannot appoint a man as pilot who has not served two years on a pilot boat in the harbor, or commanded a vessel in and out of port for three years. *Id.*

71. The power to remove is an incident to the power to appoint, as a general proposition, and is made so expressly by the Constitution. *People v. Hill*, 7 Cal. 97.

72. A law which provides that an officer may be removed in a certain way, or for a certain cause, does not restrain or limit the power of removal to the cause or manner indicated. *Id.*

§ 311. *Name of person entitled to office may be set forth in the complaint; if fees have been received by the usurper, he may be arrested.*

Whenever such action is brought, the Attorney General, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an

order may be granted by a Judge of the Supreme Court, or a District Judge, for the arrest of such defendant, and holding him to bail; and thereupon, he may be arrested and held to bail, in the same manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

1. **What are not sufficient allegations.**—In *quo warranto* to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation. *Palmer v. Woodbury*, 14 Cal. 43.

2. If the complaint be defective in this particular, the defect must be reached by special demurrer. *Id.*

3. In an action by one claiming to have been elected to an office against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 393; *Id.* 439.

4. **Who cannot demur.**—In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also certain allegations as to the right of relator to the office: *Held*, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *Flynn v. Abbott*, 16 Cal. 358.

5. **Ineligibility no defense.**—In a proceeding to contest the election of defendant as District Judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense; because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office. *Saunders v. Haynes*, 13 Cal. 145.

6. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible does not give the office to the next highest on the list. *Id.*

### § 312. *Judgment may determine the rights of both incumbent and claimant.*

In every such case judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled; or only upon the right of the defendant, as justice shall require.

### § 313. *When rendered in favor of applicant.*

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

§ 314. *Damages may be recovered by successful applicant.*

If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation of the office by the defendant.

§ 315. *When several persons claim the same office, their rights may be determined by a single action.*

When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 316. *If defendant found guilty, what judgment to be rendered against him.*

When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from the office, franchise or privilege, and that he pay the costs of the action. The Court may also, in its discretion, impose upon the defendant a fine not exceeding \$5,000; which fine, when collected, shall be paid into the treasury of the State.

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CHAPTER VI.—*Of actions against steamers, vessels and boats.*

SEC. 317. *When vessels, etc., shall be liable. Their liabilities shall constitute liens.*

318. *Actions may be brought directly against such vessels, etc.*

319. *Complaint shall be verified.*

320. *Summons may be served on the master, mate, etc.*

321. *Plaintiff may have such vessel, etc., attached.*

322. *The Clerk shall issue the writ of attachment.*

323. *Such writ shall be directed to the Sheriff. Sheriff may release upon sufficient undertaking.*

324. *Sheriff shall execute such writ without delay.*

SEC. 325. *The owner, master, etc., may appear and defend such vessel.*

326. *Proceedings in actions under this chapter.*

327. *After appearance attachment may, on motion, be discharged.*

328. *When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.*

329. *Mariners and others may assert their claim for wages notwithstanding prior attachment; how enforced.*

330. *Proof of the claims of mariners and others.*

331. *Sheriff's notice of sale shall contain measurement, tonnage, etc.*

332. *Appeals may be taken from proceedings under this chapter.*

§ 317. *When vessels, etc., shall be liable. Their liabilities shall constitute liens.*

[1860.] All steamers, vessels and boats shall be liable :

1st. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents or consignees;

2d. For supplies furnished for their use at the request of their respective owners, masters, agents or consignees;

3d. For materials furnished for their construction, repair or equipment;

4th. For their wharfage and anchorage within this State;

5th. For nonperformance or malperformance of any contract for the transportation of persons or property made by their respective owners, masters, agents or consignees;

6th. For injuries committed by them to persons or property.

The said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and shall have preference over all other demands: provided, such liens shall only continue in force for the period of one year from the time the cause of action accrued.

J. P.

1. **General decisions.**—The grant of jurisdiction to the Federal Courts in admiralty cases is not exclusive by its terms; neither is its exercise prohibited to the States; nor is its exercise by the State Courts incompatible with the harmonious working of the system established by the Federal Constitution. *Warner v Uncle Sam*, 9 Cal. 697.

2. The Court of Admiralty has no application to actions brought under section three hundred and seventeen of the Practice Act. *Sheldon v. Uncle Sam*, 18 Cal. 526.

3. **First subdivision.**—A British seaman on board a British vessel of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seamen, sue for and recover his wages in a State Court. *Pugh v. Gillam*, 1 Cal. 485.

4. **Fifth subdivision.**—In an action under the three hundred and seventeenth section of the Practice Act, by husband and wife against a steamship, for injuries inflicted upon her, plaintiffs cannot recover disbursements or expenditures by the husband. For these he must sue alone. *Sheldon v. Uncle Sam*, 18 Cal. 526.

5. In such a case, the liability of the steamship is measured by that of the owners, and extends to the entire injury sustained. *Id.*

6. The transportation of property applies to towing other vessel or craft. *White v. Mary Ann*, 6 Cal. 462.

7. In suits against common carriers, damages for pain of mind are recoverable. *Fairchild v. California Stage Co.*, 13 Cal. 599.

8. In an action for breach of contract to convey plaintiffs from San Francisco to San Juan del Sur, in Nicaragua, plaintiffs may recover not only the direct pecuniary loss resulting from the breach of the contract, but also damages for any fraudulent or oppressive conduct on the part of defendants producing great bodily or mental suffering. The whole case should go to the jury, and damages be awarded commensurate with the injuries sustained. *Jones v. Steamship Cortes*, 17 Cal. 487.

9. A contract, under section three hundred and seventeen of the Practice Act, for the transportation of passengers from San Francisco to New York, is an entirety, whether the entire voyage is to be performed in one vessel or not; and a breach of such contract at any point, as leaving the passengers on the Isthmus, renders the vessel liable. *Ord v. Steamer Uncle Sam*, 13 Cal. 369.

10. **Sixth subdivision.**—Steamboat companies, in propelling boats on the river, must provide all reasonable precaution to protect the property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to circumstances of the danger. *Gerke v. California Steam Nav. Co.*, 9 Cal. 251.

11. **Part owners have no lien for advances.**—A part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements. *Sterling v. Hanson*, 1 Cal. 480.

12. In actions against boats and vessels, under the statute, the lien attaches only when service is had in the suit. It was not the intention of the Legislature to make the lien attach when the liability was incurred. *Fisher v. White*, 8 Cal. 418.

13. As soon as a vessel is seized by a Court of Admiralty, a lien attaches in favor of the party at whose instance the seizure is made. If it was the intention of the Legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a merchant or mechanic of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined, and in the meantime, she might be run off and sold free of all such debts or incumbrances. *Meiggs v. Scannell*, 7 Cal. 408.

### § 318. Actions may be brought directly against such vessels, etc.

Actions for demands arising upon any of the grounds specified in the preceding section may be brought directly against such steamers, vessels or boats.

J. P.

§ 319. *Complaint shall be verified.*

The complaint shall designate the steamer, vessel or boat by name, and shall be verified by the oath of the plaintiff, or some one on his behalf.

J. P.

§ 320. *Summons may be served on the master, mate, etc.*

The summons attached to a certified copy of the complaint may be served on the master, mate, or any person having charge of the steamer, vessel or boat against which the action is brought.

J. P.

1. The rule that requires seizure of the thing to give jurisdiction in actions *in rem* is altered by our statute. Service on a person standing in a particular relation to the thing confers jurisdiction on the Court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 8 Id. 408; *Fisher v. White*, Id. 422.

2. Hence, jurisdiction *in rem* may exist in several Courts at the same time. *Id.*

3. The rule of law that possession of personal property is *prima facie* evidence of ownership is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Bailey v. New World*, 2 Cal. 370.

§ 321. *Plaintiff may have vessel, etc., attached.*

The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel or boat, against which the action is brought, with its tackle, apparel and furniture, attached as security for the satisfaction of any judgment that may be recovered therein.

J. P.

1. In an action against boats and vessels, under the statute, the service of process in the manner prescribed by statute is equivalent to an actual seizure. *Meiggs v. Scannell*, 7 Cal. 405.

2. In such actions, it is not necessary that the vessel should be attached, in order to acquire a lien as against subsequent purchasers. *Id.*

§ 322. *The Clerk shall issue the writ of attachment.*

The Clerk of the Court shall issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if judgment be rendered in favor of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages which may be sustained by such steamer, vessel or boat from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars, when the attachment is

issued again a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking over and above all of his just debts and liabilities. The Clerk shall file the undertaking and affidavits.

J. P.

§ 323. *Such writ shall be directed to the Sheriff. The Sheriff may release upon sufficient undertaking.*

The writ shall be directed to the Sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in custody until discharged by due course of law; unless the owner, master, agent or consignee thereof give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case, to take such undertaking.

J. P.

1. Where a bond was given in a case where the vessel was not liable to be attached under the statute: *Held*, that judgment rendered against the principal and sureties in the bond was erroneous; and that a bond given for the release of a vessel, when the vessel was not liable to seizure under that act, was invalid. *McQueen v. The Russell*, 1 Cal. 165.

2. When the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel was not liable. *Id.*

§ 324. *The Sheriff shall execute such writ without delay.*

The Sheriff to whom the writ is directed and delivered shall execute the same without delay, and shall, unless the undertaking mentioned in the last section be given, attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until discharged by due course of law; but the Sheriff shall not be authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, nor with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook or other persons employed on board.

J. P.

§ 325. *The owner, master, etc., may appear and defend such vessel.*

The owner, master, agent or consignee of the steamer, vessel or boat against which the action is brought, may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

J. P.

§ 326. *Proceedings in actions under this chapter.*

All proceedings in actions under the provisions of this chapter shall be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel or boat may be designated as defendant.

J. P.

§ 327. *After appearance, attachment may, on motion, be discharged.*

After the appearance to the action of the owner, master, agent or consignees, the attachment may, on motion, be discharged in the same manner and on like terms and conditions as attachments in other cases, subject to the provisions of section three hundred and twenty-nine.

J. P.

§ 328. *When not discharged, such vessel, etc., may be sold at public auction; application of the proceeds.*

If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the Sheriff shall sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and shall apply the proceeds of sale as follows:

1st. When the action is brought for demands other than the wages of mariners, boatmen and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages, as specified in the execution;



2d. To the payment of the judgment and costs, including his fees ; and,

3d. He shall pay any balance remaining to the owner, master, agent or consignee, who may have appeared in the action ; or if there be no appearance, then into Court, subject to the claim of any party or parties legally entitled thereto. .

J. P.

§ 329. *Mariners and others may assert their claim for wages notwithstanding prior attachment ; how enforced.*

Any mariner, boatman or other person employed in the service of the steamer, vessel or boat attached, who may wish to assert his claim for wages against the same, the attachment being issued for other demands than such wages, shall file an affidavit of his claim, setting forth the amount and the particular service rendered, with the Clerk of the Court ; and thereafter no attachment shall be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements ; and any execution issued against such steamer, vessel or boat, upon judgment recovered thereafter, shall direct the application of the proceeds of any sale : first, to the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which the Clerk shall insert in the writ : and second, to the payment of the judgment and costs and Sheriff's fees ; and shall direct the payment of any balance to the owner, master, agent or consignee, who may have appeared in the action ; but if no appearance by them be made therein, it shall direct a deposit of the balance in Court.

J. P.

1. The Court whose mesne or final process has made the first actual seizure of the thing must have exclusive power over its disposal, and the distribution of the fund arising therefrom ; and the judgments of all other Courts, when properly authenticated and filed in the Court having custody of the fund, must be regarded as complete adjudications of the subject matter of litigation, and be entitled to distribution accordingly. *Averill v. Steamer Hartford*, 2 Cal. 308.

§ 330. *Proof of the claim of mariners and others.*

If the claim of the mariner, boatman or other person, filed with the Clerk of the Court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent or consignee of the steamer, vessel or boat, against

which the claim is filed, it shall be deemed admitted ; but if contested, the Clerk shall indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest ; and shall immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the Clerk or referee may be reviewed by the County Judge, either in term or vacation, immediately after the same is given, and the judgment of the County Judge shall be final. On the review, the County Judge may use the minutes of the proofs taken by the Clerk or referee, or may take the proofs anew.

J. P.

1. Where the master of the vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey v. New World*, 2 Cal. 370.

§ 331. *Sheriff's notice of sale shall contain measurement, tonnage, etc.*

The notice of sale published by the Sheriff shall contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition.

J. P.

§ 332. *Appeals may be taken from proceedings under this chapter.*

From orders and judgments under this chapter an appeal may be taken by the owner, master, agent or consignee, on the same terms and conditions as appeals in actions against individuals.

J. P.

## TITLE IX.

## OF APPEALS IN CIVIL ACTIONS.

CHAPTER I.—*Appeals in general.\**

SEC. 333. *Judgments and orders may be reviewed.*

334. *An order made out of Court, without notice, may be reviewed by the Judge who made it.*

335. *A party aggrieved may appeal in certain cases.*

336. *Within what time appeal may be taken.*

337. *Appeal shall be made by filing and serving notice thereof.*

338. *The appellant shall within twenty days prepare statement, subject to amendment and settlement.*

339. *Omission to make statement or amendment according to preceding section shall be a waiver thereof.*

340. *Time for preparing statements or amendments may be enlarged.*

341. *Authentication of statement.*

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\* STATUTES OF 1861, p. 589, CHAP. DXXII.

*An Act to regulate Appeals in this State. Approved May 20th, 1861.*

SECTION 1. No distinction as to the mode of taking or perfecting appeals, or as to the effect of them, shall be made between cases at law and cases in equity; but the provisions of the Practice Act shall apply in the same manner to all cases of appeal.

SEC. 2. In cases tried by the Court without a jury, no judgment shall be reversed for want of a finding, or for a defective finding of the facts, unless exceptions be made in the Court below to the finding, or to the want of a finding; and in cases of a defective finding, the particular defects shall be specifically and particularly designated; and upon failure of the Court below to remedy the alleged error, the party moving shall be entitled to his exceptions, and the same shall be settled by the Judge, as in other cases; provided, that such exceptions shall be filed in the Court within five days after the making of the finding or decision excepted to.

SEC. 3. No appeal shall be dismissed for insufficiency of the notice of appeal or undertaking thereon; provided, that a good and sufficient undertaking, approved by a Judge of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal, and upon the payment of such reasonable cost as the Court may adjudge; provided, that the respondent shall not be delayed, but may move when the cause is regularly called for the disposition or dismissal of the same, if such undertaking be not given.

SEC. 4. During the progress of a cause, a party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the Judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding Judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and a party against whom judgment is rendered may appeal from such judgment without any further statement or motion; and on such appeal, it shall only be necessary to bring to the Supreme Court the transcript of the pleadings, and the judgment, and the bill or bills of exception so taken.

SEC. 5. This act shall take effect from and after the first day of July, 1861.

SEC. 342. *Statement shall be annexed to judgment roll or order appealed from.*

343. *Appeals from an order made upon affidavit.*

344. *On appeal from a judgment, the Court may review intermediate orders.*

345. *Remedial powers of the Appellate Court.*

346. *Appellant shall furnish requisite papers.*

§ 333. *Judgments and orders may be reviewed.*

[1854.] A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.

1. For definition of "judgment" and "order," see *ante*, § 144, Nos. 1-9; *post*, § 347 and § 515.

2. See *post*, §§ 336, 347.

#### DECISIONS BEARING ON THE SUBJECT OF PRACTICE IN THE SUPREME COURT.

3. **Generally.**—Questions not directly involved upon appeal, and those which are unnecessary to a judgment of affirmance or reversal, will not be considered. *West v. Smith*, 5 Cal. 96.

4. Errors which are immaterial, and do not affect the substantial rights of the parties, are unavailing on appeal, even when the subject of the exception; much less so when they are permitted without objection. *Paige v. O'Neil*, 12 Cal. 483.

5. **Facts will not be reviewed unless a new trial was asked.**—The Appellate Court will not review the facts of a case unless a new trial was asked in the Court below. *Brown v. Graves*, 2 Cal. 118; *Smith v. Phelps*, Id. 120; *Griswold v. Shark*, Id. 17; *Ingraham v. Gildermøester*, Id. 483; *Brown v. Tolles*, 7 Id. 398; *Rhine v. Bogardus*, 13 Id. 73; *Liening v. Gould*, Id. 598.

6. The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the Court on its own motion, become established facts in the case, and cannot be questioned in the Supreme Court for the first time. *Duff v. Fisher*, 16 Cal. 375.

7. The findings of fact in the Court below will not be reviewed on appeal, unless there was a motion for a new trial; and this, whether the case be in equity or at law, tried by a jury or by the Court. *Gagliardo v. Hoberlin*, 18 Cal. 394.

8. **Conflicting facts the Court will not review, except, etc.**—This Court has often held that it would not interfere with the verdict of a jury on the ground that such verdict is against the weight of evidence, except in extraordinary cases. It is almost impossible for an Appellate Court to satisfy itself in a decision upon such matters—so much depends upon the manner, bearing, character of witnesses, and the peculiar circumstances which the transcript fails to preserve, which give value and weight to testimony. *Kimball v. Gearhart*, 12 Cal. 27; 10 Id. 446; 14 Id. 167.

9. The rule is well settled that the verdict of a jury, or the findings of a Court sitting as jury, will not be disturbed where there is a conflict of testimony. *Adams v. Pugh*, 7 Cal. 150.

10. The report of a referee upon conflicting testimony must be treated in the light of a verdict of a jury; and will not be disturbed in this Court upon an appeal from an order refusing to grant a new trial in the Court below. *Ritchie v. Bradshaw*, 5 Cal. 228; *Knowles v. Joost*, 13 Id. 620.

11. This Court will require a case of very palpable mistake or error to be made

out before it will overrule the verdict of the jury on issue of fact joined in an action for the diversion of water. *Brown v. Smith*, 10 Cal. 508.

12. The rule is the same in equitable cases, where the questions are submitted to a jury on special issues. *Ritter v. Stock*, 12 Cal. 402; *Gaylord v. Hobertin*, 18 Id. 394.

13. **Rulings in certain cases reviewed without a motion for a new trial.**—It seems that errors in the rulings of the Court below will be reviewed on appeal, although no motion for a new trial is made or overruled. *Soule v. Dawes*, 6 Cal. 473.

14. Where plaintiff was nonsuited on the ground that the allegations of the complaint were not sustained by the evidence, and judgment for costs rendered against him, no motion for new trial is necessary. *Darst v. Rush*, 14 Cal. 81.

15. Where the questions in a case arise upon motion for nonsuit, and upon the action of the Court in giving and refusing instructions, a motion for new trial is unnecessary. *Sullivan v. Cary*, 17 Cal. 80.

16. **Exceptions to evidence, when reviewed.**—Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise this Court cannot review it. *Martin v. Traverse*, 13 Cal. 243.

17. Where a defendant's objection to the admission of testimony on the trial is general, he cannot be permitted to make it special for the first time in this Court. *People v. Glenn*, 10 Cal. 32.

18. An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. *Goodale v. West*, 5 Cal. 339; *Mott v. Smith*, 16 Cal. 533.

19. An exception to the admissibility of a deed in evidence must be taken on the trial of the cause, at *nisi prius*. The point cannot be considered on appeal. *Pearson v. Snodgrass*, 5 Cal. 478; *Posten v. Rasette*, Id. 467.

20. Where the objection to the introduction of testimony was in general terms that it was irrelevant, the objection will not be considered in the Supreme Court, if the testimony could, under any possible circumstances, have been relevant. *Dreux v. Domec*, 18 Cal. 83.

21. A party cannot, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the Court below, and after fishing for a verdict, for the first time assign his objections in the Supreme Court. *Covillaud v. Tanner*, 7 Cal. 38.

22. Where the motion for a new trial, though made, does not appear to have been acted on, the Appellate Court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 542.

23. **Mere technical exceptions will be disregarded.**—Where the judgment seems right on the merits, this Court will not sustain mere technical exceptions taken in the course of the trial, unless compelled by law so to do. *English v. Johnson*, 17 Cal. 107.

24. **Matters resting in the discretion of the Court below will not be reviewed on appeal.**—Lower Courts have an enlarged discretion in the conduct of the business before them; and with this discretion the Appellate Court will not interfere, unless it affirmatively appear that injustice has been done. *Broadus v. Nelson*, 16 Cal. 79.

25. The granting or refusing a continuance rests in the sound discretion of the Court below; and even when the facts show that the action of the Court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witnesses, if such affidavits can be obtained—or if not, then it should be shown to the Court that they cannot be obtained. Unless this be done, this Court will not interfere, in civil cases, with the action of the lower Court. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 161.

26. Two defendants filed a joint plea of the Statute of Limitations, and the plea being held bad as to one defendant, the Court on the trial permitted the other defendant to file a separate plea of the statute: *Held*, that this was no such gross abuse of discretion as to enable the Supreme Court to revise it. *Robinson v. Smith*, 14 Cal. 254.

27. The Supreme Court will not reverse an order of the Court below in granting a new trial, where there has been no abuse of the discretion of the Court in granting such order. *Hanson v. Bernhisel*, 11 Cal. 340; *Walton v. Maguire*, 17 Id. 92.

28. **Report of referees, when reviewed or not.**—The Supreme Court will not review a judgment entered on the report of a referee, if no objection was made to the report in the Court below. *Porter v. Barling*, 2 Cal. 72; *Id.* 122.

29. Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of the motion; and the order made denying the motion for such failure to appear is not the subject of review on appeal. *Frank v. Doane*, 15 Cal. 302.

30. **When a judgment by default will be reversed on appeal.**—There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former, as well as the latter case, the error may be corrected on appeal. *Stevens v. Ross*, 1 Cal. 94.

31. When suit is brought against a person in a county other than that in which he resides, he has thirty [now twenty] days within which to answer, exclusive of the day on which the summons is served; and a judgment by default before the expiration of the full time will be reversed on appeal. *Burt v. Scranton*, 1 Cal. 416.

32. If the summons be radically defective, it will not support a judgment by default. *The People v. Woodlief*, 2 Cal. 241.

33. A judgment by default will be reversed by the Supreme Court, where the record shows that the defendant has not been legally served with process. *Joyce v. Joyce*, 5 Cal. 449.

34. Where judgment by default is entered, in an action against a party for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that, on failure to answer, judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud.—Per Burnett, J. *Porter v. Hermann*, 8 Cal. 519.

35. Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer. *Abbe v. Marr*, 14 Cal. 210.

36. **Respondent, exceptions by, when reviewed.**—It has been the practice of the Supreme Court to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent. *Jackson v. Feather River Water Co.*, 14 Cal. 18.

37. Where the respondent takes no appeal—at least, where he files no transcript and assigns no errors—the judgment will not be reversed at his instance. *Travers v. Crane*, 15 Cal. 12.

38. On appeal, the Supreme Court notices only the errors committed against the appellant, not those committed against the successful party. *Frank v. Doane*, 15 Cal. 304.

39. **Cases may be reinstated.**—The Supreme Court has the power, under its rules, to reinstate cases which have been dismissed at a previous term. *Haight v. Gay*, 8 Cal. 297.

40. **Rehearing.**—This Court may, after its judgment has been pronounced, direct a rehearing at any time before the *remititur* has been sent to and filed in the Clerk's office of the Court below; after that has been done, the jurisdiction of this Court to order a rehearing ceases—but held, that after an order had been made granting the rehearing, and the *remititur* was filed with the Court below, the jurisdiction to reconsider the cause was not taken away. *Grogan v. Ruckle*, 1 Cal. 193.

41. On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument. *Id.*

42. Hereafter, the rule is established, that rehearings will not be granted with the same indulgence as formerly. *Andrews v. Mok. Hill Co.*, 7 Cal. 330.

43. A refusal to give an instruction cannot be urged as error for the first time on a petition for rehearing in the Supreme Court. *Payne & Dewey v. Treadwell*, 16 Cal. 220.

44. The employment of new counsel, after decision rendered, is no ground for an extension of the time prescribed by the rules of the Court for filing a petition for a rehearing. *Ferris v. Coover*, 10 Cal. 589.

45. **Amendments made in the Supreme Court.**—A mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 Cal. 197.

46. A motion to amend the judgment of the Supreme Court must be made within the ten days allowed for filing a petition for rehearing.—*Gray v. Gray*, 11 Cal. 341.

47. If no motion be made in the Court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 490.

48. Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a resettlement; and upon proper showing, made before argument, the Supreme Court may send the record back to the Court below for that purpose. So where the errors are admitted. *People v. Romero*, 18 Cal. 89.

49. Where, on appeal from an order granting a new trial, the Supreme Court affirmed the "judgment" below, and the remittitur was issued; and then, at a subsequent term, the respondent moved the Court to amend its judgment by making it read, "The order of the District Court granting a new trial is affirmed," instead of "The judgment is affirmed: Held, that the motion will be granted, on the principle that Courts have the power to amend clerical errors, and enter a judgment *nunc pro tunc* when the record itself discloses the error, even though the term has elapsed. *Swain v. Naglee*, 19 Cal. 127.

50. **Intendments in favor of judgments below.**—Every intendment must be in favor of a decision of the Court below; and a cause will not be reversed upon an error of law, unless it appears from the statement or pleadings in the case that the party complaining is injured by such error. *Johnson v. Sepulveda*, 5 Cal. 149; *Grewell v. Henderson*, 7 Cal. 290; *Ringgold v. Haven*, 1 Cal. 108; *Crane v. Brannan*, 3 Cal. 195.

51. Where there are two presumptions equally reasonable arising upon the face of the record, this Court is bound to adopt that which will maintain the judgment of the Court below. *Whipley v. Elmore*, 4 Cal. 14.

335. *A party aggrieved may appeal in certain cases.*

Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

1. Where no appeal is allowed by law, the proper method to take a case to an Appellate Court is by writ of error. *Middleton v. Gould et al.*, 5 Cal. 190; *Haight v. Gay*, 8 Cal. 297.

2. Where an appeal was taken and perfected after the death of the appellant: *Held*, that there was no authority for prosecuting the cause in the name of the deceased, but that all proceedings should have been stayed until the executor or administrator could, by suggestion, have been made a party. *Sanchez v. Roach et al.*, 5 Cal. 248.

3. The husband has not the right of appeal in an action against the husband alone, involving the homestead right; the judgment could not affect the question of homestead. *Kraemer v. Revalk*, 8 Cal. 74.

4. In all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued. *Haight v. Gay*, 8 Cal. 297.

5. A party aggrieved by a judgment has a right of appeal, although he is not a party to the record. *Adams v. Woods*, 8 Cal. 306.

6. Where a decree rendered in a suit against a corporation, contained a direction for the sale of the interest of individuals not parties to the suit, and from such decree the corporation alone appealed: *Held*, that the corporation could not take advantage of the error in the decree in embracing individuals. *Dennis v. Table Mountain Water Co.*, 10 Cal. 369.

7. I. filed his bill in the District Court against T., alleging a partnership between them, and praying for an account of the partnership property. Subsequently I. filed a petition in the same Court, setting forth the bill, and also that L. T. B. and H. B. had obtained judgment against T. the defendant, and that execution had issued on the judgment, and was levied on the partnership property of the plaintiff and defendant, and that the Sheriff was about to sell the property. The petition prayed that L. T. B. and H. B. might be made parties, and that an injunction might issue against L. T. B. and H. B. and the Sheriff: *Held*, that on the appeal of the case to this Court, it does not lie in the mouth of I. and T. to say that L. T. B. and H. B. are not parties to the suit, and have no right of appeal. *Jones v. Thompson et al.*, 12 Cal. 191.

8. The party aggrieved, entitled to appeal within the meaning of the three hundred and thirty-fifth section of the Practice Act, is the party against whom an appealable order or judgment has been entered; and when an order is made directing an injunction upon condition that an undertaking be executed and filed, the party against whom the order is made may appeal at once, without waiting until the injunction has issued. *Ely v. Frisbie*, 17 Cal. 250.

§ 336. *Within what time appeal may be taken.*

[1854, 1859.] An appeal may be taken:

1st. From a final judgment in an action, or special proceeding, commenced in the Court in which the judgment is rendered, within one year after the rendition of the judgment;

2d. From a judgment rendered on an appeal from an inferior Court, within ninety days after the rendition of the judgment;

3d. From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor, in the cases provided by law,



or on the ground that the Judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction; and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the Court.

For definition of "judgment" and order," see *ante*, § 144; *post*, § 347. See *post*, § 347, for decisions relating to the subject of appeals generally.

1. An appeal from an order granting a new trial, to be effectual, must be taken within the time allowed by statute. *Brown v. Tolles*, 7 Cal. 398.

2. A party should appeal, if aggrieved, from an order granting a new trial during the time allowed by the statute, and cannot, after taking his chances upon a second trial, rely on the fact as error. *Id.*

3. Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

4. After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. *Marziou v. Pioche*, 8 Cal. 522.

5. Where an appeal is taken in the same notice, both from a final judgment and an order refusing a new trial, after sixty days from the entry of the order for a new trial, the appeal, so far as the order is concerned, will on motion be dismissed. *Lor-rer v. Knor*, 10 Cal. 480.

6. Appeals from an inferior Court must be made within ninety days. *Dooling v. Moore*, 20 Cal.

7. The time within which an appeal must be taken, begins to run from the making of the final order or judgment appealed from, and not from the time of docketing the judgment roll. *Bank of Geneva v. Hotchkiss*, 5 How. Pr. 478.

### § 337. *Appeal shall be made by filing and serving notice thereof.*

The appeal shall be made by filing with the Clerk of the Court with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney.

1. Where the object of a notice of appeal is accomplished, it is immaterial whether the notice is given or not. *McLeran v. Shartzer*, 5 Cal. 70.

2. Where both parties appear, no notice whatever is necessary to be shown. *Id.*

3. Service of a notice of appeal upon the opposite attorney is always sufficient. *Coulter v. Stark*, 7 Cal. 244.

4. An appeal is made by filing and serving the notice of appeal. Both requisites must exist to complete the appeal. A failure to notify the adverse party is fatal. *Whipley v. Mills*, 9 Cal. 641.

5. To constitute an appeal there are three things necessary: first, filing the notice; second, service of the same; and third, filing the undertaking. All of these steps must be taken within the times limited by statute. If not so taken, there is no appeal perfected, and this Court has no jurisdiction of the case. *Hastings v. Halleck et al.*, 10 Cal. 31.

6. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the Practice Act together, they provide that an appeal is not effectual for any purpose unless an undertaking be filed, or a deposit made with the Clerk within five days after filing the notice; and failure to so file the undertaking, or make the deposit, will be fatal to the appeal, and it must be dismissed. *Elliot v. Chapman*, 15 Cal. 383; *Gordon v. Wansey*, 19 Cal. 81, affirming the last case.

7. Where a notice of appeal to the Supreme Court and undertaking were filed in the Clerk's office on the sixteenth day of December, and on the next day a copy of

the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties to the undertaking: *Held*, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokelumne Hill Company v. Woodbury*, 10 Cal. 185.

8. The filing of a notice of appeal must precede the filing of the undertaking on appeal. Until an appeal is taken, there is nothing to give effect to the undertaking. *Stockholder v. Ruess*, 10 Cal. 481; affirmed in *Dooling v. Moore*, 19 Cal. 81.

*Amendments to Secs. 338 and 339.—Passed April 27th, 1863.*

[Take effect July 1st, 1863.]

§ 338. When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall state specifically the particular errors or grounds upon which he intends to rely on the appeal, and shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more, and shall serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare amendments to the statement, and serve a copy on the appellant. The statement and amendments which may be served shall be presented to the Judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such Judge. If no amendments are served, the statement may be presented to the Judge for settlement without any notice to the respondent.

§ 339. If the party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto; and when a statement is made, and the parties shall omit within the several times above limited, the one party to propose amendments, the other to notify an appearance before the Judge, they shall respectively be deemed, the former to have agreed to the statement as prepared, and the latter to have agreed to the amendments as proposed, but the Judge who heard the cause shall, notwithstanding such omission or implied agreement, have power to correct any misstatement of facts or of his rulings which such statement may contain.

or on the ground that the Judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction; and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the Court.

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the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties to the undertaking: *Held*, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokelumne Hill Company v. Woodbury*, 10 Cal. 185.

8. The filing of a notice of appeal must precede the filing of the undertaking on appeal. Until an appeal is taken, there is nothing to give effect to the undertaking. *Buckholder v. Byers*, 10 Cal. 481; affirmed in *Dooling v. Moore*, 19 Cal. 81.

9. Unless it affirmatively appear in the record that a copy of the notice of appeal has been served upon the adverse party, or his attorney, the Supreme Court cannot take jurisdiction of the case. *Hildreth v. Gwindon*, 10 Cal. 490.

§ 338. *The appellant shall within twenty days prepare statement, subject to amendment and settlement.*

When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall contain the grounds upon which he intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more, and shall serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare amendments to the statement, and serve a copy on the appellant. If such amendments are admitted, the statement shall be corrected accordingly; and if not admitted, the statement and amendments shall be presented to the Judge who tried or heard the case, upon notice of two days to the respondent, and a true statement shall thereupon be settled by such Judge.

See Appendix, "Act concerning Courts," sec. 25, as to the time within which a Judge may sign and settle statements for new trials.

1. The practice regulating the preparation of statements to be used on appeal, from an order refusing a new trial, is regulated by Statutes of 1861, page five hundred and ninety. *Ante*, § 195.

2. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. *Barrett v. Tewksbury*, 15 Cal. 354.

3. The Supreme Court will not notice errors assigned, unless there is a proper statement on appeal. *Sherman v. Rollberg*, 11 Cal. 38.

4. Where there is no properly authenticated statement on appeal, the Supreme Court will only examine the judgment roll. *American River W. and M. Co. v. Bear River Co.*, 11 Cal. 339; *McGill v. Rainaldi*, 11 Id. 391.

5. **Form and requisites of a statement.**—Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated; and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost v. Piper et al.*, 9 Cal. 552.

6. Transcripts, on appeal to this Court, should not contain irrelevant or unnecessary matter. Instead of copying into a statement, for a new trial or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the Practice Act requires. *Knowles v. Inches*, 12 Cal. 212.

7. Before reversing the judgment of the Court below, on the ground that a certain paper was admitted in evidence, which was irrelevant to the issue joined, this Court will require the irrelevancy clearly to appear. Some facts should be adduced showing that the admission of the paper had an undue influence upon the verdict of the jury. *McGarrity v. Byington*, 12 Cal. 426.

8. When a notice of motion to dismiss a complaint on specified grounds is given, to obtain a review of the order made on the motion, the record must disclose the papers read, or the evidence offered in their support. *Freeborn & Goodwin v. Glazer*, 10 Cal. 337.

9. A stipulation inserted in the transcript and not embodied in a statement or bill of exceptions, forms no part of the record which this Court can notice. *Ritter v. Mason*, 11 Cal. 214.

10. A reference, in a statement on appeal, to the evidence as taken by the Clerk with the consent of parties, is sufficient—the evidence being in the transcript. The statement need not contain the evidence. *Dorst v. Rush*, 14 Cal. 81.

11. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent upon the face of the record. *Branger & Driard v. Chevalier*, 9 Cal. 353.

12. Affidavits in support of a motion in the Court below will not be considered by the Supreme Court unless they are incorporated in the statement or bill of exceptions. *The People v. Honshill*, 10 Cal. 83.

13. Where the minutes of the Court entered of record show that plaintiff offered in evidence the patent, and certain mesne conveyances to himself, but they do not appear in the statement for new trial, and the papers are not set out in the record, and the Court charges as above, this Court will not hold that the charge was an abstraction, or that it mistook the facts, when the motion for new trial fails to set forth the grounds relied on, and the statement does not show that the testimony therein was all the testimony offered. *McGarvey v. Little*, 15 Cal. 27.

14. Where the transcript consists of the pleadings, several affidavits, and memoranda of exceptions taken in the progress of a cause, and signed by the Judge, stating that certain motions were made on the one side upon affidavits, and resisted on the other, together with the rulings of the Court and the exceptions of counsel, but containing nothing which identifies the affidavits in the transcript as those upon which the motions were made, or which enables this Court to determine the correctness of the rulings below: *Held*, that the orders cannot be brought up for review on appeal from a final judgment in this way. *Stone v. Stone*, 17 Cal. 513.

15. A regular statement must, in such case, be prepared according to the statute, embracing so much of the affidavits or evidence, upon which the rulings were had, as to explain and point the exceptions taken; and the memoranda of exceptions signed by the Judge in the progress of the cause serve only to secure accuracy in the statement. *Id.*

16. Where documents and depositions are read or referred to on the argument of a motion for a new trial in the Court below, and are not embodied in the statement, it will be sufficient for the Judge to add, upon rendering his decision, a certificate of the matters thus read or referred to. This certificate will be sufficient identification of the documents and depositions used; and a copy of them, together with the statement and judgment roll, will constitute the only record necessary in the Supreme Court. *Loucks v. Edmondson*, 18 Cal. 203.

17. The Supreme Court cannot receive evidence otherwise than through the statement or the record. *Visher v. Webster*, 13 Cal. 58.

18. A statement on appeal not agreed to by the parties or their counsel, or settled by the Judge who tried the cause, forms no part of the record. *McIntyre v. Willis*, 20 Cal.

19. It is not necessary to embody matter of record in a bill of exceptions. *Johnson v. Sepulveda*, 5 Cal. 149.

20. It follows that the finding need not be embodied in a statement or bill of exceptions. *Reynolds v. Harris*, 8 Cal. 617.

21. Certificate of the Judge. See § 341.

22. Want of statement, bill of exceptions, assignment of errors, and where they are insufficient, effect of. — Since the

first of July, 1851, if no case or bill of exceptions be annexed to the records, the Court can only look to the judgment roll. *Wilson v. Middleton*, 2 Cal. 54.

23. If the record does not explicitly state the particular ground of granting a nonsuit, yet if it be a necessary inference from what is disclosed, it is sufficient for the action of this Court, and will be reversed if erroneous. *Morgan v. Thrift*, 2 Cal. 562.

24. To disturb a judgment of a Court of original jurisdiction, it is not sufficient that error may have intervened: but it must be affirmatively shown by the record. *White v. Wentworth*, 3 Cal. 426.

25. The naked direction of a Court, unaccompanied with any statement of facts, cannot support allegations of error, they may be in reference to the facts merely abstract, or inapt to mislead the jury. *Id.*

26. The notices and affidavits filed on an application to retax costs, were not embodied in a bill of exceptions or statement: *Held*, that the judgment must be affirmed, upon the presumption that the Court below decided properly upon all the evidence before it. *Gates v. Buckingham*, 4 Cal. 286.

27. The fact of the appellants having objected, in the Court below, to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate Court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 110.

28. Where the evidence is not set out in a statement on appeal, this Court will presume that the Court below had good reason for granting a new trial. *Dickinson v. Van Horn*, 9 Cal. 207.

29. The naked directions of a Court to the jury, unaccompanied with a statement of facts, will not satisfy this Court of substantial error, although some of the directions may not be in consonance with the rules of law. *Nelson v. Lemon*, 10 Cal. 119.

30. Errors assigned upon instructions given by the Court below will not be considered by this Court, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions. *Nelson v. Mitchell*, 10 Cal. 92.

31. Where there is no statement on appeal, the Supreme Court is confined in its examination of the case to the judgment roll; and when that is regular, the judgment below will be affirmed. *Karth v. Orth*, 10 Cal. 192.

32. Where there are no assignments of error by the appellant, the judgment of the Court below will be affirmed. *People v. Golburg*, 10 Cal. 312.

33. The Supreme Court will not notice errors assigned unless there is a proper statement on appeal. *Sherman v. Rollberg*, 11 Cal. 38.

34. Where there is no assignment of errors, or statement of the points and authorities on which the appellant relies, the appeal will be dismissed. *People v. Comedo*, 11 Cal. 70; *Id.* 129.

35. Instructions to the jury, which are not embodied in the statement on appeal or bill of exceptions, and are neither certified to by the Judge trying the cause or signed by him, cannot be the subject of consideration by the Court. *Paige v. O'Neal*, 12 Cal. 483.

36. Where there is no properly authorized statement on appeal: *Held*, that the special verdict of the jury is conclusive of the facts found. *Newberg v. Henson*, 12 Cal. 280.

37. Where there is no bill of exceptions and no statement, the rulings of the Court upon questions of law during the trial cannot be sought from the testimony as taken down by the Clerk, neither under the Act of 1850 nor 1851. *Castro v. Armesti*, 14 Cal. 38.

38. And a certificate of a Judge who tried the cause, made eight years after the trial, that he believed the exceptions taken were correctly noted in the Clerk's minutes of the testimony, cannot supply the place of a trial of exceptions. *Id.*

39. Where the instruction may be correct under any state of facts, then the Supreme Court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *People v. Lavison*, 16 Cal. 98.

40. An order by the Court below, granting a new trial, will not be disturbed where the statement on appeal consists of a mere outline of the evidence, without any rulings and instructions of the Court—the statement not purporting to give all

the testimony, and that given not being so clearly in favor of the verdict as to justify any interference with the order. *Loucks v. Edmondson*, 18 Cal. 203.

41. **Time within which statement must be prepared.**—Statements and exceptions should be speedily settled. *Hutchinson v. Bours*, 13 Cal. 50.

42. Where a statement, to be used on appeal, is not filed within twenty days after judgment, it cannot be regarded, and the case will be determined on the judgment roll alone. *Macomber v. Chamberlain*, 8 Cal. 322; *Tafferty v. Brownlie*, 11 Id. 132; *Hrehn v. Strosbury*, 12 Id. 412; *McIntyre v. Willis*, January T. 1862.

43. Moving for a new trial does not of itself operate to extend the time for filing a statement on appeal from the judgment. And where a judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Mahoney v. Caperton*, 15 Cal. 313.

44. **Grounds of appeal.**—By an assignment of errors, as the term is used in this Court, is meant a specification of the errors upon which the appellant will rely with such fullness as to give aid to the Court in the examination of the transcript. *Squires v. Foorman*, 10 Cal. 298.

45. Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the Court below. *Ford v. Holton*, 5 Cal. 319.

46. The Supreme Court will not look through a voluminous record for errors of the Court below, where none are assigned by counsel, and where there is no abstract of facts on file. *Mokelumne Hill Company v. Woodbury*, 10 Cal. 187.

47. Where there is no assignment of errors, the appeal will be dismissed. *Sayre v. Smith*, 11 Cal. 129.

48. Where no grounds or reasons are stated on motions for nonsuit and new trial, and no exceptions taken to instructions of the Court, errors cannot be assigned. *Holverstot v. Bugby*, 13 Cal. 43.

49. Where the error of a decree is apparent by reference to the bill and decree, the party aggrieved may assign the error, though no demurrer be interposed. *Gregory v. Ford*, 14 Cal. 138.

50. The statement on appeal failing to satisfy the grounds of appeal, forms no part of the record into which the Supreme Court will look, and the case stands on the judgment roll, upon the authority of *Barrett v. Tewksbury*. *Reynolds v. Lawrence*, 15 Cal. 359.

51. Where a statement does not contain any specification of the grounds of appeal, it will be regarded as a mere transcript of testimony, and will not be noticed. *Barret v. Tewksbury*, 15 Cal. 354.

52. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion of the evidence, will be immaterial for the determination of these grounds in the Supreme Court. *Id.*

53. The statement containing no specification of the grounds of appeal, and the appellant not availing himself of the privilege accorded in *Barrett v. Tewksbury*, (ante) of annexing to his statement those grounds *nunc pro tunc*, this Court will not look into the testimony to ascertain errors. The case must stand on the judgment roll. *Dobbins v. Dollarhide*, 15 Cal. 374.

54. **Form of assigning errors.**—May be stated as follows: that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question; that the suit is barred by a former adjudication between the same parties upon the same subject matter; that the property in question was the separate property of the wife; that the cause of action is barred by the Statute of Limitations. *Barrett v. Tewksbury*, 15 Cal. 359.

55. **Errors, when may be presented for the first time in the Supreme Court.**—If the complaint does not show a good cause of action, the judgment will be reversed, though no objection be taken below. *Russell v. Ford*, 2 Cal. 86.

56. An objection to the complaint that defeats only plaintiff's present right to

recover must be made in the Court of original jurisdiction during the term at which the judgment is rendered. But when the defects are of such a serious character as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged, then the objection may be made for the first time in the Appellate Court. *Hentsch v. Porter*, 10 Cal. 555.

57. Where a bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the Appellate Court, even though no demurrer be filed. *White v. Pratt*, 13 Cal. 521.

58. Where objections to evidence, though not made in the Court below, could not be under any circumstances there obviated, such objection may be taken for the first time in the Supreme Court; as, for example, objections to the substantial cause of action, not to its technical form of statement, and to the jurisdiction of the Court below, may be presented to the Supreme Court for the first time, or may be considered by the Court, whether its attention be directed to them or not. *Mott v. Smith*, 16 Cal. 533.

59. An appeal from an order refusing a new trial brings up the whole record, and on such appeal error may be assigned on the judgment roll, even though there be no appeal from the final judgment. *Hanscom v. Tower*, 17 Cal. 518.

60. Objections to the introduction of evidence confined in the Appellate Court to the grounds taken below. *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 544; *Baker v. Joseph*, 16 Id. 173.

61. **Errors relied on, must be raised in the Court below.**—Errors cannot be relied on in an Appellate Court which are not taken advantage of and raised in the Court below. *Morgan v. Hugg*, 5 Cal. 409.

62. The Supreme Court will consider only errors of law, to which exceptions have been regularly taken. *McCurtney v. Fitz Henry*, 16 Cal. 184; *Collier v. Corbett*, 15 Id. 183.

63. **Decisions illustrating the foregoing rules.**—An objection to the misjoinder of the defendant. *Sands v. Pfeiffer*, 10 Cal. 258.

64. That certain parties could not intervene. *McKenty v. Gladwin, Hugg & Co.*, 10 Cal. 227.

65. That a supplemental complaint should have been filed. *Van Maren v. Johnson*, 15 Cal. 308.

66. Objection to the form of a complaint or answer. *Sutter v. Cox*, 6 Cal. 415; *Duff v. Fisher*, 15 Id. 375.

67. That one of two counts in a complaint in an equitable action should not be tried by a jury. *Baker v. Joseph*, 16 Cal. 173.

68. An objection to an order overruling a motion to set aside the judgment and quash the execution not excepted to. *Smith v. Curtis*, 7 Cal. 584.

69. An objection to the form of a verdict. *Douglass v. Kraft*, 9 Cal. 584.

70. An objection to evidence. *Potter v. Carney*, 8 Cal. 574.

71. An objection that an account presented to the Supervisors of a county was not "authenticated," as required by the statute (Acts 1857, 167). *Randall v. Yuba County*, 14 Cal. 219.

72. Grounds for a nonsuit which were not taken in the Court below. *Baker v. Joseph*, 16 Cal. 173.

73. An objection that the finding is qualified by the words "as to plaintiff, Parke," and that the facts showing this relation to him ought to have been found, should have been taken below. *Parke v. Hinds*, 14 Cal. 415.

74. The question of the Statute of Limitations cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded. *McDonald & Blackburn v. Bear River & Auburn Water & Mining Co.*, 13 Cal. 220.

75. That interest was improperly allowed. *Whitney v. Clark*, 17 Cal. 407.

76. A mistake in the taxation of costs. *Guy v. Franklin*, 5 Cal. 416.

77. That a stipulation filed in the Court below was disregarded. *Clark v. Forshay*, 3 Cal. 290.

78. Error in a decree which could have been corrected in the Court below. *Phelan v. Raiz*, 15 Cal. 90.

79. Objections to the verification of a complaint that it was not authenticated by the seal of the Notary; that there was no venue to the affidavit; that there was no evidence that the officer was a Notary Public, etc., should be taken in the Court



below, and cannot be raised for the first time in this Court. *Kubland v. Sedgwick*, 17 Cal. 123.

80. **When no statement is required on appeal.**—It is only where an appealable order is made upon affidavits, and an appeal is taken directly from such order, that a statement is not required. But even then there must be some certificate of the Judge or Clerk specifying the affidavits used. *Stone v. Stone*, 17 Cal. 513.

81. On appeal from an order granting or refusing a new trial, there is no necessity for preparing a statement on appeal—the statement on motion for new trial being sufficient. *Loucks v. Edmondson*, 18 Cal. 203.

82. **Amendment of statement.**—A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the record. *Jessup v. King*, 4 Cal. 334.

83. While the term lasts, the Court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. The settled statement until certified is not record. *Branger & Driard v. Chevalier*, 9 Cal. 351.

84. Where there are amendments to a proposed statement on appeal, the draft proposed and the amendments allowed should be incorporated into one document, as in their separate form they cannot be regarded as any part of the record. *People v. Edwards*, 9 Cal. 286; *Skillman v. Riley*, 10 Id. 300.

85. Where amendments are made to a statement on appeal, a fair copy of the statement so amended should be made. Otherwise, the Supreme Court will not look into it. *Marlow v. Marsh*, 9 Cal. 259.

86. The Court refused to remand the cause for the purpose of amending the bill; but the Court declined to decide that a new bill with proper amendments could not be filed. *Mulford v. Cohn*, 18 Cal. 42.

§ 339. *Omission to make statement or amendment according to preceding section shall be a waiver thereof.*

[1855.] If the party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto; and when a statement is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, the other to notify an appearance before the Judge, they shall respectively be deemed, the former to have agreed to the statement as proposed, and the latter to have agreed to the amendments as proposed, and no settlement of the statement or certificate thereto by the Judge shall be required.

§ 340. *Time for preparing statement or amendment may be enlarged.*

The several periods of time above limited may be enlarged, upon good cause shown, by the Judge before whom the cause was tried.

1. If the appellant allow the twenty days to expire after taking the appeal without framing a case, he waives his right to have a case stated; and a subsequent order of the Court, made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Leech v. Alden*, 2 Cal. 95.

2. The Court may extend the time for filing a statement on appeal; but moving for a new trial will not extend the time. *Mahoney v. Caperton*, 15 Cal. 313.

§ 341. *Authentication of statement.*

The statement, when settled by the Judge, shall be signed by him, with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties, they or their attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the Clerk.

See § 195.

1. **Certificate of the Judge or attorneys.**—The statement of facts should be signed, in all cases, by the Judges, except when agreed to by the parties or their attorneys. *Hurley v. Young*, 4 Cal. 254.

2. An appeal can be heard upon a bill of exceptions taken at the trial, if signed by the Judge. *Johnson v. Sepulveda*, 5 Cal. 149.

3. A Judge can revoke his certificate to a settled statement on appeal, during the term at which the judgment was rendered; but after the term has expired it cannot be done. *Branger & Driard v. Chevalier*, 9 Cal. 351.

4. A statement on appeal is sufficient, when the Judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness. *Battersby v. Abbott*, 9 Cal. 565.

5. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Ib.*

6. Nor do affidavits used on motion to open the judgment form any part of the record, where there is no certificate of the Judge or Clerk, or an admission of counsel that they were used for that purpose. *Ritter v. Mason*, 11 Cal. 214.

7. A statement which was filed in the Court below, on motion for a new trial, and is neither agreed to by counsel nor settled by the Judge trying the case, has not sufficient authentication to constitute any portion of the record which this Court can notice. *Doyle v. Seawall*, 12 Cal. 425.

8. And a certificate of the Judge who tried the cause, made eight years after the trial, that he believed the exceptions taken were correctly noted in the Clerk's minutes of the testimony, cannot supply the place of a bill of exceptions. *Castro v. Armesti*, 14 Cal. 38.

9. A statement on appeal, certified by the Judge to be correct, according to his recollection, is not sufficient. *Van Pelt v. Littler*, 14 Cal. 194.

10. Where documents and depositions are read or referred to, on the arguments of a motion for a new trial in the Court below, and are not embodied in the statement, it will be sufficient for the Judge to add, upon rendering his decision, a certificate of the matters thus read or referred to. This certificate will be sufficient identification of the documents and depositions used; and a copy of them, together with the statement and judgment roll, will constitute the only record necessary in the Supreme Court. *Loucks v. Edmondson*, 18 Cal. 293.

§ 342. *Statement shall be annexed to judgment roll or order appealed from.*

The Clerk shall annex the statement, if the appeal be from a final judgment, to the judgment roll; if the appeal be from an order, to such order, or to a copy thereof.

§ 343. *Appeal from an order made upon affidavit.*

[1854.] The provisions of the last five preceding sections shall

not apply to appeals taken from an order made upon affidavit filed; but such affidavits shall be annexed to the order in the place of the statement mentioned in those sections.

§ 344. *On appeal from a judgment the Court may review intermediate order.*

Upon an appeal from a judgment, the Court may review any intermediate order involving the merits, and necessarily affecting the judgment.

See notes to § 333.

§ 345. *Remedial powers of the Appellate Court.*

Upon an appeal from a judgment or order, the Appellate Court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the Appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the Appellate Court that the appeal was made for delay, it may add to the costs such damages as may be just.

See N. Y. Code, § 330.

1. **Judgments directed in the court below.**—The Court below cannot refuse to give effect to the judgment of this Court; and a judgment entered by the Clerk, in such case, is just as binding as if entered in the Supreme Court itself. *McMillan v. Richards*, 12 Cal. 467.

2. It is not the practice of this Court to direct the entry of a judgment in the Court below, in actions at law, except where the facts have been found by the Judge who tried the cause, or by the special verdict of a jury, or where, from the character of an action or pleadings, one of the party is entitled to judgment without proof. *Bagley v. Eaton*, 10 Cal. 126.

3. The Court below allowed to enter judgment for plaintiff, on the return of the case, for the amount of the verdict, if plaintiff so desires; otherwise, to retry the cause. *Reniff v. Cynthia*, 18 Cal. 669.

4. The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the Appellate Court will compel the Court below to issue an attachment to punish a contempt. *Merced Co. v. Fremont*, 7 Cal. 130.

5. Where the Court below granted a nonsuit—the case being submitted on complaint on an undertaking and answer—the Supreme Court, while reversing the judgment below, refused to enter judgment for plaintiff, although the answer presented no defense, holding, that as there was no trial below, the Court could not know what course defendants would have taken, by amendments or otherwise, by way of defense to the action. *McMillan v. Dana*, 18 Cal. 339.

6. The Court, on reversing a judgment, can render such judgment as the Court below should have done. *Gahen v. Neville*, 2 Cal. 81; *Bidleman v. Kewen*, Id. 248.

7. When the Court below has wrongfully refused to dissolve an attachment improperly issued, the Supreme Court will order it dissolved, even if the final judgment is affirmed on a review of the case. *Griswold v. Sharp*, 2 Cal. 17.

8. The Supreme Court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 107.

9. Instead of remanding a cause for a new trial, where the judgment below is erroneous, this Court will so modify it as finally to settle the controversy, when the rights of the parties appear from the records to be finally ascertained. *Persae v. Cole*, 1 Cal. 369.

10. After a judgment has been rendered by the Supreme Court, a material modification of such judgment should not be made upon a petition for a rehearing—the rehearing should first be granted. *Clark v. Boyreau*, 14 Cal. 634.

11. **When will new trial be ordered.**—When it is apparent that, in case a new trial should be granted, the verdict of the jury must be in favor of the plaintiff, the judgment of the Court below, in favor of the plaintiff, will not be disturbed. *Yohler v. Falsom*, 1 Cal. 207.

12. Where, on appeal, the complaint is so radically defective as not to authorize the judgment of the Court below, a new trial may be granted, with leave to the plaintiff to amend his complaint, on such terms as the Court below may deem just. *Sterling v. Hanson*, 1 Cal. 478.

13. When it is manifest, from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the Court below has refused a new trial, this Court will reverse the judgment, and order a new trial. *The People v. Acosta*, 10 Cal. 195.

14. **Restitution of property and rights.**—The eighth section of the Act concerning Courts of Justice, (see Appendix) which provides that when a “judgment or order is reversed or modified, this Court may make complete restitution of all property and rights lost by the erroneous judgment or order,” does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like. *Farmer v. Rogers*, 10 Cal. 335.

15. The three hundred and forty-fifth section of the Practice Act, authorizing the Supreme Court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower Court from exercising the same power. *Reynolds v. Harris*, 14 Cal. 667.

16. **Effects of reversal.**—After reversal of an erroneous judgment, the parties in the Court below have the same rights which they originally had. *Phelan v. Supervisors of San Francisco*, 9 Cal. 15.

17. Therefore, when a final judgment on demurrer to the complaint sustaining the demurrer was reversed, the plaintiff had the right to amend, on application to the Court below. *Id.*

18. A judgment “of reversal” in the Supreme Court is not necessarily a bar to further proceedings in the action. The opinion rendered with the judgment is advisory to the Court below; and after the reversal of an erroneous judgment, the parties have the same rights which they had originally. *Stearns v. Aguirre*, 7 Cal. 443.

19. Where a judgment is rendered in this Court reversing the judgment of the Court below, and remanding the case for further proceedings, it becomes the law of the case, though erroneous. *Gunter v. Laffan*, 7 Cal. 588; *Clary v. Hoagland*, 6 Cal. 685.

20. Where a judgment is rendered, and an appeal taken to this Court, the Court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 130.

See *ante*, page 191, Nos. 47–49.

21. **Damages and costs.**—Ten per cent. damages was awarded by the Supreme Court where the appeal was for delay. *Russell v. Albert et al.* 2 Cal. 158.

22. Where the respondents obtained a judgment on the twenty-third of December, 1851, and the appeal bond was filed on the twenty-fourth of December, and a certificate of the Clerk of the same Court, dated February 2d, 1852, that no transcript, record, or other papers in the cause had been filed, and the affidavit of respondents produced that the appeal was taken for delay, the Court ordered the appeal to be dismissed, with ten per cent. damages and costs. *Buckley v. Morse*, 2 Cal. 149.

23. When the objection to the judgment was entirely unsupported, the judgment was affirmed, with ten per cent. damages. *Bates v. Fisher*, 2 Cal. 355.

24. When the questions raised by the record, on appeal in this Court, have been repeatedly settled by this Court, or are decided by reference to plain elementary principles of law, the judgment of the Court below will be affirmed, with damages. *Pinkum v. Wemple*, 12 Cal. 449.

25. Where a judgment was affirmed in part, and reversed in part, the respondent was allowed his costs in Court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 51.

26. Where an appellant has failed to file a transcript of the record showing that the appeal had been perfected, the Court ordered it dismissed, with ten per cent. costs. *Pucheco v. Bernal*, 2 Cal. 150.

27. Fifteen per cent. damages awarded in *De Witt v. Porter*, 13 Cal. 171; twenty per cent. in *Nickerson v. California Stage Company*, 10 Cal. 520.

### § 346. *Appellant shall furnish requisite papers.*

[1854.] On an appeal from a final judgment, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment roll, and the statement annexed, (if there be one) certified by the Clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the Court below; such copies to be certified by the Clerk to be correct. If any written opinion be placed on file on rendering the judgment, or making the order in the Court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed.

1. **Record, what to contain.**—On an appeal from an order made on affidavits filed, no statement is necessary. The affidavits must be annexed to the order, in place of a statement, and the certificate of the Clerk should specify the affidavits used; and to enable him to do so, he should, at the time, mark them as filed on the motion. *Payne v. Linhill*, 10 Cal. 370.

2. Where a notice of motion to dismiss a complaint on specified grounds is given, to obtain a review of the order made on the motion the record must disclose the papers read, or the evidence offered in their support. *Freeborn & Goodwin et al. v. Glazer*, 10 Cal. 337.

3. An affidavit of one of the attorneys in a cause showing the objections made to the selection of the jury, although copied into the transcript, is no part of the record, and therefore cannot be noticed. *Magee v. The Mokelumne Hill Company*, 5 Cal. 258.

4. Appellants must show in their transcripts the necessary bond to effect the appeal, or else, by the certificate of the Clerk in the Court below, that the undertaking has been filed, and the time of filing the same. *Bryan v. Berry*, 8 Cal. 130.

5. Parties intending to take advantage of the failure to file the requisite undertaking, must do so before the case is submitted. *Cook v. Klink*, 8 Cal. 352.

6. Transcripts used on appeal to this Court must show that an undertaking has been filed in due time, and that a notice of the appeal has been duly served upon the other side. *Franklin v. Reiner*, 8 Cal. 340.

7. Dismissal of appeal, and effect of.—Appeal dismissed because the record contained no copy of the pleadings. *Hart v. Plum*, 14 Cal. 148.

8. Where an appellant has failed to file a transcript of the record showing that the appeal had been perfected, the Court ordered it dismissed, with ten per cent. costs. *Pacheco v. Bernal*, 2 Cal. 150.

9. If there be no statement required, the Appellate Court will not dismiss for want of one. *Bryan v. Berry*, 8 Cal. 130.

10. An appeal, which had been dismissed for failure to file the transcript in time, was reinstated upon cause shown. *Stack v. Barnes*, 2 Cal. 162.

11. The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence, not as an affirmance of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits. *Karth v. Light*, 15 Cal. 324.

12. Where an appeal, regularly taken, is dismissed for want of prosecution, the dismissal operates as an affirmance of the judgment below, and a second appeal cannot be allowed. *Id.*; *Chamberlin v. Reed*, 16 Cal. 207.

13. The only mode of avoiding the consequence of such dismissal is to move, during the term, or before the remittitur has gone out, to vacate the order of dismissal and reinstate the cause. *Chamberlin v. Reed*, 16 Cal. 207.

## CHAPTER II.—*Appeals to the Supreme Court from the District Courts.*

SEC. 347. *When an appeal may be taken.*

348. *Appellant shall file undertaking within five days.*

349. *Undertaking on appeal from a money judgment.*

350. *Appeal from a judgment for delivery of documents or personal property.*

351. *Appeal from a judgment directing the execution of a conveyance, etc.*

352. *Undertaking on appeal from a judgment concerning real property.*

353. *Stay of proceedings. The security on appeal may be limited in case of executor, etc.*

354. *Undertaking may be in one instrument or several.*

355. *Justification of sureties on undertaking on appeal.*

356. *Undertaking in cases not specified above.*

357. *Appeals may be brought to a hearing on notice.*

358. *On judgment on appeal, a remittitur shall be certified to the Clerk of the Court below.* •

§ 347. *When an appeal may be taken.*

[1854.] An appeal may be taken to the Supreme Court from the District Courts, in the following cases :

1st. From a final judgment rendered in an action or special proceeding commenced in those Courts, or brought into those Courts from another Court ;

2d. From an order granting or refusing a new trial ; from an order refusing to change the place of trial of an action or proceeding after a motion is made therefor, in the cases provided by law, or on the ground that a Judge is disqualified from hearing or trying the same ; from an order granting or dissolving an injunction ; and from any special order made after final judgment.

See N. Y. Code, § 341.

For definition of "final judgment" and "order," see *ante*, page 188, Nos. 1-9, § 336.

See also as to definition of "order" *post*, § 515.

1. **An appeal will lie.**—From a judgment or order putting a party in contempt. *Ex parte Rowe*, 7 Cal. 175 ; *Ware v. Robinson*, 9 Cal. 107.

2. From an order improperly dissolving an attachment. *Reiss v. Brady*, 2 Cal. 132, but not until after final judgment. *Baker v. Rosenthal*, 7 Id. 514.

3. From an order setting aside a final decree in equity and granting a rehearing. *Riddle v. Baker*, 13 Cal. 295.

4. From an order changing the judgment. *Bryan v. Berry*, 8 Cal. 130.

5. From an order refusing to quash an execution. *Gilman v. Contra Costa County*, 8 Cal. 52.

6. From error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashirie*, 13 Cal. 53.

7. An appeal lies from an order setting aside a final decree in equity and granting a rehearing, as it is in effect granting a new trial. *Riddle v. Baker*, 13 Cal. 302.

8. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer ; and also appointed a receiver to take charge of the property of the corporation until the further order of the Court ; collect money due or to become due it ; sell certain stock, and pay the proceeds in accordance with the decree, etc. : *Held*, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 145.

9. Pease, who had instituted a suit in the Supreme Court of New York against defendants, moved the Fourth District Court of this State, where the suit of *Adams v. Woods et al.* was pending, for an order on Naglee—receiver in this last suit, and as such having in his possession the books of the firm—to attach certain of those books to his deposition to be taken under commission from New York in the suit there. The Court below ordered the books to be delivered to Wells, Fargo & Co. to be by them taken to New York, and after being used on the trial in Pease's suit, to be returned to Naglee : *Held*, that this intervention by Pease is in effect a special proceeding, involving new and distinct rights, and that the order is not interlocutory, and may be appealed from. *Adams v. Woods*, 18 Cal. 30.

10. An appeal to a demurrer for want of proper parties is good, where it is determined by the Court that a substantial right is affected by the omission to join such party. *Burgoyne v. Holmes*, 3 Cal. 50.

11. Under the act regulating appeals, passed the twenty-sixth of April, 1851, an appeal lies from every order and decision of an inferior Court which *affects a substantial right*. *Id.*

22. From an interlocutory order, except in the cases provided by statute. Such order can only be reviewed on appeal from the final judgment. *De Barry v. Lambert*, 10 Cal. 503.

23. An appeal will not lie from an order of Court refusing to set aside an interlocutory judgment. It should be taken upon the order itself. *Stevens v. Marvin*, 3 Cal. 376.

24. By the amended Practice Act, an appeal does not lie from an interlocutory order. *The People v. Thurston*, 5 Cal. 517.

25. Appeals from interlocutory orders are the creations of statute, and cannot be extended by implication. *Juan v. Ingoldsby*, 6 Cal. 439.

26. An order setting aside the report of a referee appointed to take an account, is merely interlocutory, and is not the subject of appeal before final judgment or decree. *Johnson v. Dopkins*, 6 Cal. 83.

27. An order refusing to issue a commission to take testimony, and an order refusing to change the venue, are not appealable orders, though they may be reviewed on appeal from final judgment. *People v. Stillman*, 7 Cal. 117.

28. This Court will not hear any objections to an order entered in the Court below by consent of parties. *Merholz v. Sessions*, 9 Cal. 277.

29. An order setting aside the findings of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character and not the subject of appeal. *Baker v. Baker*, 10 Cal. 527.

30. Lien of the judgment suspended by an appeal.—An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate Court. *Deucey v. Latson*, 6 Cal. 130.

31. If an undertaking on appeal to the Supreme Court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin v. Mastick & Broder*, 16 Cal. 403.

32. Generally.—Where the parties in the Court below stipulated that a motion for a new trial should be denied, they cannot question, in this Court, the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

33. A party cannot be permitted to prosecute two separate and distinct remedies in the Supreme Court for a review of the same question at the same time. *Kirk v. Reynolds*, 12 Cal. 99.

34. No appeal lies to the Supreme Court from an order of the Court below overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

35. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the District Court, especially when the case involved complicated facts, and was not tried by the Judge, but by a ref-



*Amendment to Sec. 347.—Passed April 27th, 1863.*

[Takes effect sixty days after passage.]

§ 347. An appeal may be taken to the Supreme Court from the District Courts in the following cases:

*First*—From a final judgment rendered in an action or special proceeding commenced in those Courts, or brought into those Courts from other Courts.

*Second*—From an order granting or refusing a new trial, from an order granting or dissolving an injunction, and from an order refusing to grant or dissolve an injunction, and from any special order made after final judgment.

See N. Y. Code, § 341.

For definition of "final judgment" and "order," see *ante*, page 188, Nos. 1-9, § 336.

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1. **An appeal will lie.**—From a judgment or order putting a party in contempt. *Ex parte Rowe*, 7 Cal. 175; *Ware v. Robinson*, 9 Cal. 107.

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3. From an order setting aside a final decree in equity and granting a rehearing. *Riddle v. Baker*, 13 Cal. 295.

4. From an order changing the judgment. *Bryan v. Berry*, 8 Cal. 130.

5. From an order refusing to quash an execution. *Gilman v. Contra Costa County*, 8 Cal. 52.

6. From error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashirie*, 13 Cal. 53.

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11. Under the act regulating appeals, passed the twenty-sixth of April, 1851, an appeal lies from every order and decision of an inferior Court which affects a substantial right. *Id.*

pole being too heavy, the machinery with which to proceed in the excavation was sent to the depth of the shaft. On the machinery operations will be in vigor, the company having full success. For the first time below the Fortuna, on Bear river, a and sixteen feet deep, a man can be sent up, and the rock of a claim be again reserved.

**Appeal will lie.**—From an order refusing an injunction. *Richards* Cal. 422.

From an order refusing to dissolve an injunction. It should be from the injunction. *Martin v. Travers*, 7 Cal. 253.

From an order refusing or granting a change of venue. *Id.*; *Juan v.* 439.

From a judgment of nonsuit entered on motion of plaintiff. 6 Cal. 666.

16. From an order made before final judgment refusing to transfer a cause from a District Court of this State to a Court of the United States, because of the alienage of defendant. *Hopper v. Kalkman*, 17 Cal. 517; *Brooks v. Calderwood*, 19 Id. 124.

17. From an order refusing to set aside a former order. *Henly v. Hastings*, 3 Cal. 341; *Horn v. Volcano W. Co.*, 18 Cal. 141.

18. From a mere decision on demurrer before final judgment. *Moraga v. Emeric*, 4 Cal. 308.

19. From an order making a new party defendant. *Beck v. City of San Francisco*, 4 Cal. 375.

20. From an order refusing to grant a commission to take testimony. *People v. Stillman*, 7 Cal. 117.

21. From an order refusing to discharge an attachment until after final judgment. *Baker v. Rosenthal*, 7 Cal. 514.

22. From an interlocutory order, except in the cases provided by statute. Such order can only be reviewed on appeal from the final judgment. *De Barry v. Lambert*, 10 Cal. 503.

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29. An order setting aside the findings of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character and not the subject of appeal. *Baker v. Baker*, 10 Cal. 527.

**30. Lien of the judgment suspended by an appeal.**—An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate Court. *Dewey v. Latson*, 6 Cal. 130.

31. If an undertaking on appeal to the Supreme Court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin v. Mastick & Broder*, 16 Cal. 403.

**32. Generally.**—Where the parties in the Court below stipulated that a motion for a new trial should be denied, they cannot question, in this Court, the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

33. A party cannot be permitted to prosecute two separate and distinct remedies in the Supreme Court for a review of the same question at the same time. *Kirk v. Reynolds*, 12 Cal. 99.

34. No appeal lies to the Supreme Court from an order of the Court below overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

35. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the District Court, especially when the case involved complicated facts, and was not tried by the Judge, but by a ref-

eree, by whom the alleged errors were committed. The failure to prosecute, in such a case, is an abandonment of the motion. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Id. 303; *Green v. Doane*, Id. 304.

36. Where an order is made granting a writ of assistance, and an order is also made refusing to set the first order aside, an appeal must be taken from the last order. *Id.*

37. Where a party resorts to a summary remedy by motion to set aside an order, and has tried the motion on the merits, he cannot fall back and seek to reverse the order by a direct appeal. *Horn v. Volcano Water Co.*, 18 Cal. 141.

### § 348. Appellant shall file undertaking within five days.

To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the Clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made, with the Clerk within five days after the notice of appeal is filed.

See *post*, § 355; N. Y. Code, § 334.

1. **Execution and formal parts of undertaking.**—Under our statutes, undertakings are on the same footing with bonds. *Canfield v. Bates*, 13 Cal. 606.

2. The execution of the paper, the delivery of it to the Clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is *prima facie* a sufficient proof of delivery, if delivery is essential, as if the instrument were sealed. *Dore v. Covey*, 13 Cal. 502.

3. The stay of proceedings, accorded by the statute to the execution of the undertaking, is a sufficient consideration. *Id.*

4. Where an instrument, purporting to be a bond on appeal, contains words of obligation, and has a scroll opposite the name of one of the two signers, who contemporaneously verify the instrument as their bond, it is the bond of both. *Canfield v. Bates*, 13 Cal. 606.

5. Where the appeal is *bona fide*, and not taken for delay, appellate Courts will always permit a new undertaking to be filed where the original is defective. *Coulter v. Stark*, 7 Cal. 244.

6. Where an appeal has been dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

7. Residence of the sureties, and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions, and are intended for the benefit of the other party, and he may waive them. In this case the respondent treated the appeal as regularly made; made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument. *Dore v. Covey*, 13 Cal. 502; *Dobbins v. Dollarkhide*, 15 Cal. 375.

8. The names of the sureties need not appear in the body of the papers. *Id.*

9. The statute requires the places of residence and occupation of the sureties to be stated in an undertaking on appeal only when a stay of execution upon a judgment directing the payment of money is sought. *Dobbins v. Dollarkhide*, 15 Cal. 374.

10. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond. Even were this not the case, where such an omission occurs, leave should be granted to file a good bond. *Billings v. Roadhouse*, 5 Cal. 71.

11. An undertaking on an appeal is an independent contract on the part of the

sureties, in which it is not necessary that the appellant should unite. *Curtis v. Richards*, 9 Cal. 33; *Tissot v. Darling*, 9 Cal. 278.

12. But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single; and in a suit thereon the plaintiff would be entitled to the full amount. *Swain v. Graves*, 8 Cal. 549.

13. **Time of filing.**—The undertaking on appeal to the Supreme Court must, in all cases, be filed within five days after filing notice of appeal; and the Court has no power to extend the time. *Elliott v. Chapman*, 15 Cal. 383.

14. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the Practice Act together, they provide that an appeal is not effectual for any purpose, unless an undertaking be filed, or a deposit made with the Clerk within five days after filing the notice; and failure to so file the undertaking, or make the deposit, will be fatal to the appeal, and it must be dismissed. *Id.*

15. The period of five days fixed by law for filing the undertaking, cannot be abridged by the error or negligence of the appellant; nor can that appellant, by serving a copy of the notice of appeal before the original is filed, keep the respondent watching the Clerk's office to see when it is done. *Hastings v. Halleck et al.*, 10 Cal. 31.

16. If the appellants have been guilty of no laches in perfecting their appeal, the Court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the meantime order a stay of all proceedings in the inferior Court until the extended period shall have expired: in such case the Court may impose such terms as shall appear proper. *Bradley v. Hall*, 1 Cal. 199.

17. **Effect of filing undertaking.**—The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 277.

18. Where the notice of appeal recites that the appellant appeals both from an order granting a writ of assistance and from an order refusing to set it aside, and the undertaking on appeal stipulates to answer the consequences of the appeal from the former order only: *Held*, that this order alone will be considered by the Supreme Court. *Horn v. Volcano Water Co.*, 18 Cal. 141.

See, also, §§ 353 and 355.

19. **The State need not file an undertaking.**—Where the people of the State are appellants, it is not necessary to file the usual undertaking on appeal. *The People v. Utingan*, 5 Cal. 389.

20. **Actions on an undertaking on appeal.**—Where an appeal is withdrawn or dismissed by consent of both parties, without being called to a final hearing, no action can be maintained on the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

21. Where, in an action on an appeal bond conditioned to pay the judgment appealed from, if the same should be affirmed by the Appellate Court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: *Held*, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase v. Ries*, 10 Cal. 517.

22. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 87.

23. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. *Pico v. Webster*, 14 Cal. 204.

24. Where an appeal is taken by a party, and, as a condition to give it effect, a bond or undertaking with or by sureties is annexed—the undertaking being executed for the benefit of the appellant—the law presumes that it was executed at his request; and probably no proof of that fact is requisite in a suit by the surety against the appellant for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 73.

25. The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey v. Schillenberger*, 10 Cal. 390.

§ 349. Undertaking on appeal from a money judgment.

*Amendment to Sec. 349.—Passed April 27th, 1863.*

[Took effect on passage.]

§ 349. If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment.

judgment or order shall be required to be assigned or delivered be placed in the custody of such officer or receiver as the Court may appoint; or unless an undertaking be entered into, on the part of the appellant, with at least two sureties, and in such amount as the Court, or the Judge thereof, or County Judge, may direct, to the effect that the appellant will obey the order of the Appellate Court upon the appeal.

N. Y. Code, § 336.

§ 351. *Appeal from a judgment directing the execution of a conveyance, etc.*

If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal until the instrument is executed and deposited with the Clerk with whom the judgment or order is entered, to abide the judgment of the Appellate Court.

§ 352. *Undertaking on appeal concerning real property.*

If the judgment or order appealed from direct the sale, or delivery of possession of real property, the execution of the same shall not be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the Judge of the Court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

N. Y. Code, § 338.

§ 353. *Stay of proceedings. The security on appeal may be*

Sec. 353. Whenever an appeal is perfected as provided in the preceding sections in this chapter, it shall stay all further proceedings in the Court below upon the judgment or order appealed from, or upon the matters embraced therein; and on appeal, and filing an appeal bond on appeal from an order discharging an attachment or from an order directing an injunction, said attachment or injunction shall not be dissolved, but shall remain in full force until the cause be disposed of on appeal, but the Court below may proceed upon any other matter embraced in the action, and not affected by the judgment or order appealed from.

etc.

, as provided by the preceding sections, shall stay all further proceedings in the Court below upon the judgment or order appealed from, or upon the matters embraced therein; and on appeal, and filing an appeal bond on appeal from an order discharging an attachment or from an order directing an injunction, said attachment or injunction shall not be dissolved, but shall remain in full force until the cause be disposed of on appeal, but the Court below may proceed upon any other matter embraced in the action, and not affected by the judgment or order appealed from.

the Court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator, trustee or other person acting in another's right; provided, that an appeal shall not continue in force on attachment unless an undertaking be executed and filed on the part of the appellant by at least two sureties in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which respondent may sustain by reason of the attachment, in case the order of the Court below be sustained; and unless, also, notice of the appeal be given within five days after service of the notice of the entry of the order appealed from, and such appeal be perfected and the undertaking in this section mentioned be filed within five days thereafter.

pm. And the Court below may, limit the security required by the appellant if it is an executor, administrator, trustee or other person acting in another's right.

Supreme Court on appeal, the judgment is not evidence upon the questions at issue. *Try v. Bowman*, 13 Cal. 634.

t, pending an appeal, though no undertaking was given. *Ross v. Austin*, 2 Cal. 183.

3. An appeal from an order of reference stays the proceedings. *Smith v. Pollock*, 2 Cal. 92.

4. Where the sureties to an undertaking, on appeal to the Supreme Court, justify in a sum less than double the amount specified in the undertaking, but more than double the amount of three hundred dollars, such undertaking is sufficient, under section three hundred and forty-eight of the Code, though insufficient to stay the issuance of the execution. *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185.

5. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the Court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the Supreme Court to dismiss the appeal. *Dobbins v. Dollarhide*, 15 Cal. 374.

6. A stay of proceedings, from its nature under an appeal, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction. *Merced Mining Co. v. Fremont*, 7 Cal 132; *Hicks v. Michael*, 15 Cal. 109.

§ 354. *Undertaking may be in one instrument or several.*

The undertaking prescribed by sections three hundred and forty-eight, three hundred and forty-nine, three hundred and fifty, and three hundred and fifty-two, may be in one instrument, or several, at the option of the appellant.

N. Y. Code, § 340.

§ 355. *Justification of sureties on undertaking on appeal.*

[1854.] An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties, that each is worth the amount specified therein over and above just debts and liabilities, exclusive of the property exempt from execution; except where the judgment exceeds three thousand dollars and the undertaking on appeal is executed by more than ten sureties, they may state in their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the amount be equivalent to that of two sufficient sureties; and the adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and they or other sureties justify before a Judge of the Court below, a County Judge, or the County Clerk, within five days the appellant gives notice to the adverse party, to the amount stated in the affidavits, the appeal shall be regarded as if no such undertaking had been given; and in all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the Court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

See *ante*, § 348; N. Y. Code, § 341.

1. **Time of examination of sureties.**—Where a party gave notice of justification of the sureties on an undertaking before the Clerk of the Court below, on the seventh of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice soon after ten of that day: *Held*, that the Clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. *Lower v. Knox*, 10 Cal. 480.

2. **Time within which to justify cannot be extended.**—Where the respondent gave notice, April 20th, excepting to the sufficiency of the sureties

on an undertaking on appeal, and appellant there gave notice that the sureties would justify on the twenty-fifth of the same month, and orders were afterwards made extending the time of justification to May 1st: *Held*, that the failure of the sureties to justify within five days after notice of exception to their sufficiency rendered the appeal a nullity: that the statute upon this subject is peremptory; and that the Court had no power to extend the time. *Roush v. Van Hagen*, 17 Cal. 121.

**3. Officers before whom to justify.**—Under the three hundred and fifty-fifth section of the Practice Act, where respondent excepts to the sureties on the undertaking on appeal, the sureties must justify before a County Judge of the county where the suit is pending, where that officer is selected, and where such justification was before the County Judge of another county, where the sureties resided, the appeal will be dismissed. *Roush v. Van Hagen*, 18 Cal. 668.

**4. Failure to justify, effect of.**—A failure of sureties upon an undertaking on appeal to justify, when they are excepted to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower v. Knox*, 10 Cal. 480.

If the President of the Court, filed in the Clerk's office of the District Court his notice of appeal of the above program of making, and the respondent, within the time allowed by law, excepted to the sufficiency of the sureties to the undertaking, and they failed to justify to the Clerk of said Court, who issued execution on said judgment: it was error in the Judge of said Court to make an order of *supersedeas*, and execution. *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 188.

**New undertaking may be filed, &c.**—After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the Supreme Court, military occupation, military cannot justify without notice to the adverse party; and in this case, the suspension being made without notice, the appeal was ordered to be dismissed, appellants, within ten days, file a new undertaking, and the sureties thereon on notice to the respondent. *Stark v. Barrett*, 15 Cal. 361.

**Dismissal of appeal.**—An appeal will not be dismissed on the ground of the insufficiency in the justification of the sureties on the undertaking, when the appeal was both to render the appeal effectual and to stay execution, and the appeal was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal.

*Undertaking in cases not specified above.*

cases not provided for in sections three hundred and forty-nine, three hundred and fifty, three hundred and fifty-one, and three hundred and fifty-two, the perfecting of an appeal, by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section three hundred and forty-eight, shall stay proceedings in the Court below upon the judgment or order appealed from; except that where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the Appellate Court.

N. Y. Code, § 342.

1. In an action for personal property, with damages for its detention, the verdict was for defendant, and subsequently the Court below made an order granting a new trial, from which order defendant appealed to the Supreme Court, giving an undertaking for damages and costs, under the three hundred and forty-eighth section of the Practice Act, and then the Court below, against the objection of defendant, proceeded to try the cause a second time, when plaintiff had verdict and judgment: *Held*, that the judgment must be reversed, because the Court below



could not proceed with a second trial until the appeal from the order was determined. *Ford v. Thompson*, 19 Cal. 118.

2. On appeal from an order granting a new trial, in such a case, the verdict being in favor of the defendant and appellant, undertaking for damages and costs according to the three hundred and forty-eighth section of the Practice Act is sufficient to stay proceedings pending the appeal. *Id.*

§ 357. *Appeals may be brought to a hearing on notice.*

[1854.] Appeals in the Supreme Court may be brought to a hearing by either party, upon a notice of three days to the opposite party. Before the argument, each party shall furnish to the other, and each of the Justices, a copy of his points and authorities, or either party may file one copy thereof with the Clerk, who shall cause the requisite copies to be made.

1. Where notice of argument has been given by the appellant, the respondent may move for an affirmance of the judgment *ex parte*, although he has given no notice of argument. Bennett, J. dissenting. *Constant v. Ward*, 1 Cal. 333.

2. Though a decision of the Supreme Court will not be set aside for want of a formal statutory notice of argument, if the adverse party had actual notice, yet a judgment of affirmance for failure of the appellant to appear will be set aside, if he had not actual notice, etc. *Lightstone v. Laurencel*, 2 Cal. 106.

3. Where counsel, in a cause pending in the Supreme Court, stipulate to submit the case to the Court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation. *Cahoon et al. v. Levy*, 10 Cal. 216.

§ 358. *On judgment on appeal, remittitur shall be certified to the Clerk of the Court below.*

When judgment is rendered upon the appeal, it shall be certified by the Clerk of the Supreme Court to the Clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the Clerk with whom the roll is filed shall attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In cases of appeal from an order, the Clerk shall enter at length in the records of the Court the certificate received, and minute against the entry of the order appealed from a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified, as the case may be, by the Supreme Court, on appeal.

1. The Court below cannot refuse to give effect to the judgment of this Court; and a judgment entered by the Clerk, in such case, is just as binding as if entered in the Supreme Court itself. *McMillan v. Richards*, 12 Cal. 467.

2. Where a case is appealed from the District Court to the Supreme Court, and the Supreme Court reverses the judgment of the District Court, and directs the entry of a final judgment, such judgment can be entered by the Clerk of the District Court in the vacation. *Id.*

3. The act of the Clerk in entering the judgment is a mere ministerial act. *Id.*

CHAPTER III.—*Appeals to the Supreme Court from the County Court.*

SEC. 359. *Appeal may be taken from County Court, in certain cases.*

360. *Security on appeal shall be the same as provided in preceding chapter.*

361. *Appeals may be brought to a hearing on notice.*

362. *Appellant shall furnish papers on appeal.*

§ 359. *Appeal may be taken from County Court, in certain*

Sec. 359. An appeal may be taken to the Supreme Court from a final judgment of the County Court—*First*—in actions of forcible entry and detainer, and in an action to prevent or abate a nuisance; in a proceeding in insolvency; in an action wherein the legality of any tax, impost, assessment, toll or municipal fine is in question, and in any special case within the appellate jurisdiction of the Supreme Court over which the Legislature may require said County Court to exercise jurisdiction. *Second*—From an order granting or refusing a new trial; from an order granting or dissolving, or an order refusing to grant or dissolve an injunction; and from any special order made after final judgment in the cases in this section before enumerated.

Sec. 360. Security shall be given upon such appeal in the same manner, to the same extent and with the same effect as in appeals to the Supreme Court from the District Court from judgments or orders of a similar character, and like justification on the part of the sureties may be required.

presiding Judge to hear the excuse on the part of the party failing to produce it, and if sufficient, to allow him to file a bond. *Id.*

4. Where a party appealed from a Justice's Court to a County Court, and the Justice neglected to send up with the record the notice of the appeal: *Held*, that it was error to refuse to allow appellant the opportunity of moving to compel the Justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 9 Cal. 17.

5. The Supreme Court has jurisdiction to hear and determine appeals from the judgment of the County Court, on question of fraud made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

6. A refusal by the County Court, on appeal from a Justice, to permit an amendment of the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of the importance of the amendment, this Court will not interfere. *Canfield v. Bates*, 13 Cal. 606.

7. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—*query*, whether the Supreme Court has jurisdiction of an appeal from the County Court. *Paul v. Silver*, 16 Cal. 73.

8. No appeal will lie from a judgment for two hundred dollars, costs and per centage. The amount must exceed two hundred dollars—that is, the amount in dispute—costs and per centage are only incidental to the action. *Zabriskie v. Terry*; *Volan v. Reese et al.*, 20 Cal.

may be taken to the Supreme Court Court, in all cases where the amount exceeds one hundred dollars, or where the legal municipal fine, is in question.

an appeal from a County Court to the Supreme Court, *Leton v. Gould et al.*, 5 Cal. 190.

has no jurisdiction in cases on appeal, and by the statute, should be made in the County Court. *Howard v. Harmon*, 5

within the proper time, it is the duty of the party failing to produce it, and if sufficient,

§ 360. *Security on appeal shall be the same as in preceding chapter.*

[1854.] Security shall be given upon such appeal in the same

*and with the same effect*  
manner ~~and~~ to the same extent as ~~upon~~ <sup>an</sup> appeals to the Supreme Court from the District Court, and like justification on the part of the sureties may be required.

See *ante*, §§ 348 to 356, inclusive, and notes.

§ 361. *Appeal may be brought to a hearing on notice.*

[1854.] Appeals from the County Courts shall be brought to a hearing in the same manner, and upon like notice, as appeals from the District Court.

See *ante*, § 357 and notes.

§ 362. *Appellant shall furnish papers on appeal.*

[1853, 1854.] The appellant shall furnish the papers for the Supreme Court in the same manner as upon appeals from the District Court.

#### CHAPTER IV.\*—*Appeals to the District Courts from the Probate Courts.*

SEC. 363. *Appeals may be taken from Probate Court.*

364. *Time within which appeal shall be taken.*

365. *Appeals shall be heard as soon as possible.*

§ 363. *Appeals may be taken from Probate Court.*

An appeal may be taken from a Probate Court to the District

\*STATUTES OF 1855, 301; WOOD'S DIGEST, 421, ARTICLE 2264.

SEC. 297. [1861.] An appeal may be taken to the Supreme Court from an order, decree or judgment of the Probate Court, where the estate or amount in dispute exceeds two hundred dollars, in the following cases:

1st. For or against granting or revoking letters testamentary or of administration, or of guardianship;

2d. For or against admitting a will to probate;

3d. For or against the validity of a will, or revoking the probate thereof;

4th. For or against setting apart property, or making an allowance for a widow or child;

5th. For or against directing the sale or conveyance of real property;

6th. On settlement of any account of an executor or administrator, or guardian;

7th. For or against declaring, allowing or directing the payment of a debt, claim, legacy or distributive share.

SEC. 298. [1855.] The appeal may be taken within sixty days after the order, decree or judgment is made and entered in the minutes of the Court; it shall be made by filing with the Clerk of the Probate Court a notice, stating the appeal from the order, decree or judgment, or some specific part thereof, and by executing an undertaking, or giving surety, on such appeal in the same manner, and to the same extent, as upon an appeal to the Supreme Court from the District Court; provided, the appeal of an executor or administrator who has given an official bond shall be complete and effectual without the undertaking; provided also, from an order, decree or judgment, made since the first day of October, eighteen

Court of the district in which the Probate Court is held, in the following cases :

1st. From an order or decree admitting a will to probate, or refusing the same ;

2d. From an order setting apart property, or making an allowance for the widow or children ;

3d. From an order granting letters testamentary or of administration, or appointing a guardian of an infant, or of an insane person, or of a person incompetent to manage his property, or refusing to grant such letters, or to make such appointment, or making such letters or appointment ;

4th. From an order directing the sale or conveyance of real property ;

5th. From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed ; or by which such allowance or direction is refused ;

6th. From an order made on the settlement of an executor, administrator or guardian.

See Belknap's Probate Law, pp. 21-22 ; also pp. 159-161.

§ 364. *Time within which appeal shall be taken.*

The appeal shall be taken within thirty days after the order or decree appealed from is entered with the Clerk.

§ 365. *Appeals shall be had as soon as possible.*

[1854.] Appeals from the Probate Court shall be brought to a

hundred and fifty-four, the appeal may be taken within sixty days after the passage of this act. After the appeal is determined, suit may be brought and prosecuted to judgment on the undertaking, in the name of any party beneficially interested therein.

Sec. 299. When a party who has a right to appeal, wishes a statement of the case to be annexed to the record, he shall prepare and file the same within twenty days after the entry of the order, decree or judgment ; provided, if the order, decree, or judgment has been made since the first day of October, eighteen hundred and fifty-four, he shall prepare and file such statement within twenty days after the passage of this act.

Sec. 300. The provisions as amended, of Chapter 1, Title IX, of the act entitled "an Act to regulate proceedings in civil cases in the Courts of Justice in this State," passed April 29th, 1851, so far as the same do not conflict with the provisions of this act, shall be applicable to appeals from the Probate Court.

Sec. 301. [1851.] When an order or decree appointing an executor, or administrator, or guardian, shall be reversed on appeal, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he shall qualify, shall be as valid as if such order or decree had been affirmed. When any executor or administrator resigns, or is removed, a successor may be appointed, if a necessity therefor exists, without again proving the death and evidence of the testator or intestate.

Sec. 302. [1856.] Where it is not otherwise prescribed by law, the Probate Court or the Supreme Court, on appeal, may in its discretion, order costs to be paid by any party to the proceedings, or out of the estate, as justice may require ; execution for the costs may issue out of Probate Court.

See Belknap's Probate Law, pp. 21-31 ; also pp. 159-161.

hearing at the earliest period practicable. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the District Court may order the appeal to be dismissed.

1. The District Court has only original jurisdiction; it has no appellate powers. *Caulfield v. Hudson*, 3 Cal. 289; *Zander v. Coe*, 5 Cal. 230.

## CHAPTER V.—*Appeals to the County Courts from Justices' and Recorders' Courts.*

SEC. 366. *Appeals may be taken on questions of law, or on questions of law and fact.*

367. *Miscellaneous provisions on trials in County Courts.*

§ 366. *Appeals may be taken on questions of law, or on questions of law and fact.*

[1853, 1854.] Judgments in all civil cases rendered by Justices', Recorders' and Mayors' Courts, may be reviewed by the County Court; when the appeal is taken on questions of law alone, it shall be heard on a statement of the case prepared as prescribed in Title XVI of this act. When the appeal is taken on questions of fact, or on questions of both law and fact, the action shall be tried anew in the County Court, and either party may, on such trial, demand a jury.

See post, §§ 624-628.

1. On appeal from a Justice's Court to the County Court, on questions of law alone, if a new trial be ordered, it should take place in the County Court. *People v. Freelon*, 8 Cal. 517.

2. The County Court has the sole appellate jurisdiction in all cases, civil and criminal, arising in Justices' Courts, subject to such restrictions as the Legislature may impose, by making the decisions of the Justice final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 85.

3. A defendant who has been properly served with process issued out of a Justice's Court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts, there being no issue of fact. *The People ex rel. Jones v. The County Court of El Dorado County*, 10 Cal. 19.

4. Nor could he ask the County Court to hear the appeal on questions of law, unless there was a statement filed of the grounds on which he intended to rely. *Id.*

5. In such case, where the defendant appeals on questions of both law and fact, he is not entitled to a trial *de novo*. *Id.*

6. In all cases the issue of fact must be made in the Court of original jurisdiction. The County Court can only retry the issue tried in the Court below. This is what is meant by a trial anew in the County Court, under section six hundred and twenty-six of the Practice Act. *Id.*

7. Where a cause is heard on appeal in a County Court, for the purpose of trying the same *de novo*, it is the duty of the Court to proceed with the trial on the merits of the case. *Coyle v. Baldwin et al.* 5 Cal. 75.

§ 367. *Miscellaneous provisions on trials in County Courts.*

[1854.] Upon an appeal heard upon a statement of the case, the County Court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to, or dependent upon, said judgment; and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial shall be conducted in all respects, as trials in the District Court. The provisions of this act, as to changing the place of trial, and all the provisions as to trials in the District Court, shall be applicable to trials on appeal in the County Court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the County Court, after notice, may order the appeal to be dismissed. Judgments rendered in the County Court on appeal, shall have the same force and effect, and be enforced in the same manner, as judgments in actions commenced in the District Court.

1. Where a motion is made in the County Court to dismiss an appeal, on the grounds that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: *Held*, that it is error to refuse to allow him so to do. *Cunningham v. Hopkins*, 8 Cal. 33.

2. When an appeal is taken on questions of fact alone, the Appellate Court will not disturb the verdict, when there is any evidence to support it. *Escolle and Wife v. Merle*, 9 Cal. 94.

3. Where in suit in a Justice's Court for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the County Court, where the judgment was set aside, and an order made transferring the case to the District Court, where, after trial, plaintiff again had judgment: *Held*, that the County Court had authority, under sections five hundred and eighty-one and three hundred and sixty-seven of the Practice Act, to transfer the case to the District Court; that the effect of the appeal to the County Court was to vest it with authority to make all orders necessary for the determination of the case; and as the case was to be tried *de novo*, and the County Court was incompetent, under the statute, to try it, the transfer to the District Court was necessary. *Cullen v. Langridge*, 17 Cal. 67.

4. The fact that the sum sued for in such case was only two hundred dollars, does not deprive the District Court of jurisdiction. The fact that the title to real property was involved, and not the sum sued for, establishes the jurisdiction. The issue upon this question of title had first to be found in favor of plaintiff, before he could recover any damages. This issue involved not only the right of plaintiff to recover, but the entire value of the property; and there being nothing in the record to show this value to be insufficient to support the jurisdiction, the presumptions are in favor of the validity of the proceedings. *Id.*

## TITLE X.

## MISCELLANEOUS PROCEEDINGS.

CHAPTER I.—*Proceedings against joint debtors.*

SEC. 368. *Parties not summoned in action on joint contract may be summoned after judgment.*

369. *Summons, in that case, what to contain and how served.*

370. *Affidavit to accompany summons.*

371. *Answer, when filed and what it may contain.*

372. *What will constitute the pleadings in the case.*

373. *Issues how tried, and verdict what to be.*

§ 368. *Parties not summoned in action on joint contract, may be summoned after judgment.*

When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section thirty-two, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons.

See §§ 32, 145. N. Y. Code, § 375.

§ 369. *Summons, in that case, what to contain and how served.*

The summons, as provided in the last section, shall describe the judgment, and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner and returnable within the same time as the original summons. It shall not be necessary to file a new complaint.

§ 370. *Affidavit to accompany summons.*

The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and shall specify the amount due thereon.

§ 371. *Answer, when filed and what it may contain.*

Upon such summons the defendant may answer within the time specified therein, denying the judgment or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the Statute of Limitations.

§ 372. *What will constitute the pleadings in the case.*

If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer, shall constitute such written allegations.

§ 373. *Issues how tried, and verdict what to be.*

The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

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CHAPTER II.—*Confession of judgment without action.*SEC. 374. *Judgment may be confessed for debt due, or contingent liability.*375. *Statement in writing, and form thereof.*376. *Filing statement, and entering judgment.*• § 374. *Judgment may be confessed for debt due, or contingent liability.*

A judgment by confession may be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

N. Y. Code, § 382.



§ 375. *Statement in writing, and form thereof.*

A statement in writing shall be made, signed by the defendant, and verified by his oath to the following effect :

1st. It shall authorize the entry of judgment for a specified sum ;

2d. If it be for money due, or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due ;

3d. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

N. Y. Code, § 383.

1. **Generally.**—Where a judgment was rendered by confession in open Court upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot at the instance of one not a party to the judgment be invoked to set aside, or show the judgment was a nullity. *Cloud v. El Dorado County*, 12 Cal. 133.

2. The Legislature did not intend any more definiteness or particularity, in cases of confession of judgment, than in complaints upon the same cause of action in the ordinary course of procedure.—BALDWIN, J. *Cordier v. Schloss*, 12 Cal. 143.

3. Where a judgment by confession is attacked by a creditor as fraudulent against him, on the ground that the object of the debtor and the judgment creditor was to assist the debtor in forcing a compromise with his other creditors rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A general averment that the intent was to hinder, delay and defraud, is insufficient.

4. Such general averment of fraud will not put the adverse party on his defense.

5. An insolvent debtor, wishing to prefer a particular creditor, may give him a confession of judgment, with the agreement between them that judgment shall not be entered on the confession if the debtor succeeds in obtaining from his other creditors an extension—the creditor himself, in that event, also to give time ; but that if the other creditors refuse such extension and attempt to attach, then that the judgment may be entered on the confession and execution issued. Such confession, not used nor intended to be used to influence the negotiations with the other creditors, but simply designed to secure the preferred creditor, and at the same time to extend as much leniency to the debtor as is consistent with the creditor's own security, is valid. *Meeker v. Harris*, 19 Cal. 278.

6. After showing an indebtedness to have arisen, it is not necessary to aver that the debt has not been paid or discharged. *Lanning v. Carpenter*, 20 N. Y. (6 Smith) 447, 458.

7. It is not necessary that a confession of judgment should state in terms that the amount for which judgment is entered "is due or to become due." The facts from which the law draws such a conclusion need alone be stated. *Id.*

8. **Sufficient statements.**—The statement for a judgment by a confession was as follows : " The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated June 21st, 1854, in the sum of seven hundred dollars, with interest ; that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and seven cents, together with eighty dollars and forty-one cents now due the plaintiff from the defendants as costs, in an action brought against the defendants by the plaintiff, upon said promissory note, in the Supreme Court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants : " *Held*, sufficient, there being no pretense that the

money secured was not justly due. *Freleigh v. Brink*, 18 How. Pr. 89, reversing S. C. 16 Id. 272.

9. A statement is sufficient to authorize a judgment by confession, under section three hundred and eighty-three of the Code, which states that the indebtedness arose upon a promissory note, the date of which is given, made by the defendant to the plaintiff, in the sum of seven hundred dollars, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of seven hundred and eighty-two dollars and forty-seven cents, with the addition: "And we hereby state that the sum hereby by us confessed is justly due to the said plaintiff, without any fraud whatever." *Freleigh v. Brink*, 22 N. Y. (8 Smith) 418.

10. A statement of judgment by confession to secure the plaintiff's contingent liability as indorser for the accommodation of the defendant is sufficient if it describes the notes, naming the respective parties, the dates, amounts, and times, and places of payment. The consideration need not be stated, nor the fact that the notes had been discounted, this fact being inferable. *Marks v. Reynolds*, 12 Abbott, 403.

11. The statement must show that the sum confessed does not exceed the debt. It is not enough that it state that the confession is for a debt justly due and owing, for money lent, etc., or for goods sold, etc., without stating the amount of the loan, or the total price. *Clements v. Gerow*, 30 Barb. 325.

12. **Insufficient statements.**—A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So where the statement is, that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this: that it does not show the kind, or quantity, or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money, and how much for goods; and the judgment confessed is *prima facie* fraudulent. *Cordier v. Schloss*, 18 Cal. 576.

13. A statement, under the three hundred and seventy-fifth section of the Practice Act, for confession of judgment, to the effect that plaintiffs are owners of a note, that the note was given for goods sold and delivered by plaintiffs to defendants, and money had and received by defendants, is insufficient, and the judgment rendered thereon *prima facie* fraudulent against creditors. *Id.*

14. Whether each of the defects above named would be fatal to the judgment, not decided; but the failure to state the amounts due, severally, for goods and for money, would be fatal, just as such an averment is insufficient in an ordinary complaint. *Id.*

15. In a confession of judgment, the statement of the facts was as follows: "A promissory note, (for a specific date and amount) which note was given to L. W. & Co., for goods, wares and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor, and came into the hands of the plaintiffs for a valuable consideration:" *Held*, insufficient. *Claflin v. Sanger*, 11 Abb. 214, note.

16. Plaintiff was a grocer, and defendant resided with his family in his vicinity. Defendant's confession of judgment stated that a part of the indebtedness arose on his promissory note, dated May 1st, 1856, given by defendant to plaintiff for "groceries, goods and merchandise furnished to me before that time by the plaintiff, and from his store," and specified the amount of interest due: *Held*, insufficient, as not showing within what period the goods were furnished, nor the facts on which interest could be claimed. *McKee v. Tyson*, 10 Abb. 392.

17. Under the provision of section three hundred and eighty-two of the Code—that judgment by confession may be entered for money due, or to become due, or to secure any person against contingent liability—the person who may be secured is the plaintiff in the judgment. A confession of judgment to A to secure him, and as trustee for B to secure a contingent liability assumed by B, is, as against subsequent creditors, illegal, even though made in good faith in respect to the latter liability. *Marks v. Reynolds*, 12 Abb. 403.

18. A statement for judgment by confession "that the plaintiff, at various times in the years 1854 and 1855, sold and delivered to me large quantities of meat, and upon such sale there is now justly due to the plaintiff a balance in the said sum of \$2,000," is insufficient. The total amount of the debt and the amount of the payments should be stated. *Neusbaum v. Keim*, 7 Abb. 23.

19. A statement for judgment by confession, referring to a schedule annexed: Held insufficient, for not showing the necessary facts. *Haman v. Keinhart*, 11 Abb. 132.

20. A judgment confession to secure a contingent liability on a guaranty, should be set aside on motion of a subsequent judgment creditor, if the statement in which it is entered does not show the particulars of the contract on which the liability rests —e. g. in case of a promissory note, who are the parties to it, and the facts which impose a liability thereon on the plaintiff, and in behalf of the defendant, and such a liability as the defendant is bound to protect. *Winnebreuner v. Edgerton*, 8 Abb. 419.

21. Judgment was entered upon a statement in the following form: "The above indebtedness arose on a promissory note made by the defendants to the plaintiff, dated, etc., in the sum of seven hundred dollars, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this due the sum of seven hundred and eighty-two dollars and seven cents, together with eighty dollars and forty-one cents, now due the plaintiff from the defendants as costs in an action brought against the defendants by the plaintiff, on said promissory note, in the Supreme Court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants." Held, on motion of other judgment creditors, insufficient. *Chappell v. Chappell*, 2 Kern. 215; *Dunham v. Waterman*, 6 Abb. 357.

22. To say, "that amount of money being had by the defendants of the plaintiff," without saying when and in what sums had, or under what circumstances, and for what objects or purposes; whether as a gift, or a loan, or for money collected and misapplied, or in payment of property not delivered, or upon any other contract which the defendants failed to execute, is to withhold and conceal from the other creditors of the defendants the most material facts out of which the debt arose. *Freleigh v. Brink*, 16 How. 272.

23. A statement on confession of judgment, which describes a promissory note of the defendant, and alleges that it was given for money had and received by me of the said plaintiff, at my request," is insufficient to sustain the judgment. *Daly v. Matthews*, 12 Abb. 403, note.

24. **Void judgments.**—A judgment confessed for the purpose of hindering, delaying, or defrauding creditors, is void as to such creditors. *Ryan v. Daly*, 26 Cal. 38.

25. A confession of judgment to a *bona fide* creditor, and the issuance of execution and making levy under the same by the judgment debtor, without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. *Id.*

26. Judgment by confession for over two hundred dollars, in a Justice's Court, is void for want of jurisdiction. *Feillett v. Engler*, 8 Cal. 77.

27. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void as against creditors. *Scales v. Scott*, 13 Cal. 76.

28. **Judgments, prima facie void.**—In a confession of judgment, the omission to fully comply with the statute to set forth explicitly the facts and circumstances upon which the debt was incurred, does not *ipso facto* make the judgment void; it merely throws the burden of proof on the judgment creditor, if his judgment is contested by other creditors, of proving that his judgment was fair and not fraudulent. *Richards v. McMillan*, 6 Cal. 419.

29. But such a failure to make all the disclosures required by the statute is *prima facie* evidence of fraud. *Id.*

30. *Richards v. McMillan* (6 Cal. 419) holding that the omission, in a confession of judgment, to state the facts out of which the indebtedness arose, etc., is strictly in accordance with the statute, does not render the judgment a nullity, but is simply *prima facie* evidence of fraud, affirmed. *Cordier v. Schloss*, 18 Cal. 576.

31. **Judgments; how, when and by whom may be set aside.**—An application by a judgment creditor to set aside his confession of judgment

should show that the claim was not just, and that the judgment ought not to have been confessed. *Arrington v. Sherry*, 5 Cal. 514.

32. A junior judgment creditor has no right to join with the defendant in an application to set aside such confessed judgment. He must resort to a Court of Chancery if he is dissatisfied. *Id.*

33. A junior judgment creditor must resort to a Court of Equity if he is dissatisfied with the *bona fides* of the confession of judgment. *Id.*

34. In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales v. Scott*, 13 Cal. 76.

35. A statement, made for the purpose of entering a judgment under sections two hundred and eighty-two and three hundred and eighty-three of the Code, which states, as the facts out of which the debt arose, "that heretofore, at the city of New York, I (Hodgins) made my certain promissory note for the sum of \$2,000, payable on demand; and that I have not paid said note; and that I am justly indebted to the plaintiff (Kendall) thereupon, in the said sum of \$2,000," is wholly insufficient to authorize a judgment to be entered upon it. *Kendall v. Hodgins*, 7 Abbott, 309.

36. A judgment entered on such a statement, and an execution issued on such a judgment, may be set aside on motion of a *bona fide* purchaser of lands on which the judgment is an apparent lien, as to such purchaser and the lands so purchased, and such lands be declared to be freed and discharged of and from the apparent lien of such judgment, and of and from any and every proceeding whatsoever, under and by virtue of, or founded on such judgment. *Id.*

37. Although a judgment entered by confession may be set aside on motion, when the statement is insufficient, yet such relief may also be obtained as part of the judgment in a creditor's action. *Jessup v. Hulse*, 29 Barb. 539.

38. A judgment by confession, though entered on a defective statement, will not be set aside on motion of a creditor whose judgment is also entered on a defective statement. *Rue v. Lawser*, *Id.* 380, note.

39. The right to set aside a judgment by confession, which is void for insufficiency of the statement on which it is entered, is not limited to judgment creditors, but extends to any creditors whose rights are affected. A grantee or mortgagee of premises upon which the judgment is a lien may attack and resist in defense of any action to which they are parties, any such judgment, where the same is sought to be enforced by suit upon the judgment by the plaintiff, as well as they might move to vacate the judgment, or bring an action for the same purpose. *Norris v. Denton*, 30 Barb. 117.

40. **Amendment.**—If a judgment taken by confession upon a defective statement can be amended, it can only be as to the rights of the parties to the judgment, and without prejudice to those of other judgment creditors. *Jessup v. Halse*, 29 Barb. 539.

41. Where a judgment on confession is filed and docketed, the omission of the Clerk to make the indorsement on the statement required by section three hundred and eighty-four of the Code cannot affect the substantial rights of any party, and it may be made *nunc pro tunc* by an order of the Court. *Daly v. Matthews*, 12 Abb. 403, note.

42. The Court has no power to allow an amendment of an insufficient statement and confession of judgment, so as to render the judgment entered upon it valid as against intervening *bona fide* purchasers or incumbrancers. *Hammond v. Bush*, 8 Abbott, 152.

43. Whether the Court has power, in any case, to compel one who has confessed judgment upon an insufficient statement to sign and verify an amended statement.—*Query?* *Id.*

### § 376. *Filing statement and entering judgment.*

The statement shall be filed with the Clerk of the county in which the judgment is to be entered, who shall indorse upon it, and

enter in the judgment book, a judgment of such Court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, shall thereupon become the judgment roll.

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CHAPTER III.—*Submitting a controversy without action.*

SEC. 377. *Controversy, how submitted without action.*

378. *Judgment on, as in other cases, but without costs prior to notice of trial.*

379. *Judgment may be enforced or appealed from as in an action.*

§ 377. *Controversy, how submitted without action.*

Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which should have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The Court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

N. Y. Code, § 372.

§ 378. *Judgment on, as in other cases, but without costs, prior to notice of trial.*

Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

N. Y. Code, § 373.

§ 379. *Judgment may be enforced or appealed from, as in an action.*

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

CHAPTER IV.—*Of arbitrations.*

SEC. 380. *Who may submit controversy to arbitration; and exceptions.*

381. *Submission to arbitration shall be in writing.*

382. *Submission may be entered as an order of Court. Revocation.*

383. *Powers of arbitrators.*

384. *Majority of arbitrators may determine any question; they shall be sworn.*

385. *Award to be in writing; when judgment to be entered.*

386. *Award may be vacated in certain cases.*

387. *Court may, on motion, modify or correct the award.*

388. *Decision on the motion subject to appeal, but not the judgment entered before motion.*

389. *If submission be revoked and an action be brought, what to be recovered.*

§ 380. *Who may submit controversy to arbitration; and exceptions.*

Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.

1. The agreement of parties cannot divest Courts of their proper jurisdiction. *Muldrow v. Norris*, 2 Cal. 74.

2. The statute concerning arbitrations is but a reaffirmance of the common law, and gives to the parties no higher rights than they might have asserted in a Court of Equity in case of mistake, fraud or accident. The doctrine of *Muldrow v. Norris*, (2 Cal. 74) reaffirmed. *Peachy v. Ritchie*, 4 Cal. 205.

3. One partner cannot bind his copartner by a submission of partnership matters to arbitration; but such a submission would be good against the partner agreeing to it. *Jones v. Bailey*, 5 Cal. 345.

§ 381. *Submission to arbitration to be in writing.*

The submission to arbitration shall be writing, and may be to one or more persons.

See § 529.

1. To constitute a submission to arbitration under the statute, so as to give the award the effect of a judgment, the statute must be pursued in the manner in which the submission is filed with the Clerk, and the motion made for judgment on the award. *Heslep v. City of San Francisco*, 4 Cal. 1; *Carley v. Lindsay*, 14 Id. 295.

§ 382. *Submission may be entered as an order of Court. Revocation.*

It may be stipulated in the submission that it be entered as an order of the County Court or of the District Court, for which purpose it shall be filed with the Clerk of the county where the parties, or one of them, reside. The Clerk shall thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered, the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the Court to make an award, and the award may be enforced by the Court in the same manner as a judgment. If the submission be not made an order of the Court, it may be revoked at any time before the award is made.

1. A stipulation in the submission that neither party should appeal, and a power of attorney to confess judgment pursuant to the award, will not bar an appeal from a judgment on the award; especially under our system, where law and equity are blended together. *Muldrow v. Norris*, 2 Cal. 74.

2. The report of a referee, and the award of an arbitrator, are in all essentials the same. *Grayson v. Guild*, 4 Cal. 122.

3. Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the County Court: *Held*, that it was void *in toto*, that Court having no jurisdiction over the subject matter of the award. *Williams v. Walton*, 9 Cal. 142.

4. Where a submission to arbitration is made an order of Court, under the Practice Act, the Clerk may enter judgment on the award, in due time, without any further order of the Court. *Carsley v. Lindsay*, 14 Cal. 390.

§ 383. *Powers of arbitrators.*

Arbitrators shall have power to appoint a time and place for hearing; to adjourn from time to time; to administer oaths to witnesses; to hear the allegations and evidence of the parties, and to make an award thereon.

§ 384. *Majority of arbitrators may determine any question; they shall be sworn.*

All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in

controversy, and to make a just award according to their understanding.

1. Arbitrators have no common law powers when appointed in the mode provided by statute. *Williams v. Walton*, 9 Cal. 145.

§ 385. *Award to be in writing ; when judgment to be entered.*

The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the Court, the award shall be filed with the Clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the Clerk in the judgment book, and shall thereupon have the effect of a judgment.

1. That the arbitrator did not act upon all the items or property of a partnership, is no ground for vacating his award. Certainly not, if the facts were not brought before him. *Carsley v. Lindsay*, 14 Cal. 390.

2. An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive. *Jarvis v. Fountain Water Co.*, 5 Cal. 179.

3. An award bad in part may be enforced for the part that is good, if not attacked for fraud ; and the matter is divisible. *Muldrow v. Norris*, 2 Cal. 74.

4. The Court will not disturb the award of an arbitrator unless the error complained of, whether of law or fact, appear on the face of the award. *Tyson v. Wells*, 2 Cal. 122, overruled, as to a report of a referee, in *Cappe v. Brizzolara*, 19 Cal. 607.

5. An award cannot be impeached because contrary to law and evidence. The Practice Act (Sec. 385, *et seq.*) prescribes the sole grounds to vacate an award by the Court, on motion. *Carsley v. Lindsay*, 14 Cal. 390.

§ 386. *Award may be vacated in certain cases.*

The Court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion :

1st. That it was procured by corruption or fraud ;

2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced ;

3d. That the arbitrators exceeded their powers in making their award ; or that they refused, or improperly omitted, to consider a



part of the matters submitted to them ; or that the award is indefinite, or cannot be performed.

1 The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission. *Muldrow v. Norris*, 12 Cal. 331.

2. If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional, and the award binding only in case the arbitrators pass upon every subject, either specially referred to them, or brought to their notice under the general terms of the submission. *Id.*

3. Where one of the principal matters in dispute, passed upon by the arbitrators, was subsequently set aside by a higher Court, and the judgment rendered upon the award vacated by reason of the error of the arbitrators in passing upon said matter, it left the award as though such item submitted had never been passed upon ; and consequently, the award did not effect the purposes of the submission by settling all matters of controversy between the parties. The consideration which moved the parties to enter into the submission had failed, and hence the award is void. *Id.*

4. The award being void, a release of action, filed by one of the parties in pursuance of the submission, is also void. *Id.*

5. The doctrine that an award may be good in part and bad in part applies to instances where there has been an excess of power in arbitration by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independent and distinct matter forming no consideration for other parts of the award, and the settlement of which could not have contributed to induce the arbitration. *Id.*

6. A useless and invalid determination upon one item properly presented within the general terms of the submission, must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional, to notice the item at all. *Id.*

7. Instance of an award not void for uncertainty. *Carsley v. Lindsay*, 14 Cal. 390.

8. When arbitrators have published their award, any alteration whatever, without the consent of parties, will vitiate it ; and this, though the alteration was to fix certain amounts left undetermined in the award. *Porter v. Scott*, 7 Cal. 312.

9. It is the duty of arbitrators to pass upon the whole subject in controversy ; and if the terms of the award render a further inquiry necessary to ascertain a sum to be paid, or an act to be done, it is void. *Id.*

10. Arbitrators, under a general submission, are not bound to decide according to direct law ; but where they intend to decide according to law, a mistake apparent on the face of the award is fatal. *Muldrow v. Norris*, 2 Cal. 74.

11. Courts of Equity in the absence of statutes will set aside awards for fraud, mistake or accident ; an award may be set aside for a mistake of law, when it appears on the face of the award. *Id.*

12. If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law. *Id.* 79.

13. Where parties submit to an arbitrator they are presumed to know that his award will be final ; and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. *Montifiori v. Engles*, 3 Cal. 431.

### § 387. Court may, on motion, modify or correct the award.

The Court may, on motion, modify or correct the award where it appears :

1st. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein ;

2d. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted ;

3d. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

1. That the Court will not disturb the award of an arbitrator, or the report of a referee, unless the error complained of, whether of law or fact, appears on the face of the award or report. *Tyson v. Wells*, 2 Cal. 122, overruled in *Cappe v. Brizolara*, 19 Cal. 607.

2. Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside. *Pierson v. Norman*, 2 Cal. 599.

3. One of the arbitrators is a competent witness to impeach his award by giving testimony as to facts which occurred in a public hearing, and in the presence of the parties and of their counsel, and as to the decisions openly made by himself and his associates. (*Van Cortlandt v. Underhill*, 19 Johns. 411 ; *Newland v. Douglass*, 2 Id. 62) ; *Cole v. Blunt*, 2 Bosw. 116.

§ 388. *Decision on the motion subject to appeal ; but not the judgment entered before motion.*

The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action ; but the judgment entered before a motion is made shall not be subject to appeal.

1. A stipulation that neither party will appeal is not binding. *Muldrow v. Norris*, 2 Cal. 74.

§ 389. *If submission be revoked and an action brought, what to be recovered.*

If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

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CHAPTER V.—*Offer of the defendant to compromise the whole or a part of an action.*

§ 390. *Proceedings on offer of defendant to compromise after suit brought.*

The defendant may, at any time before the trial or judgment,

serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the Clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs from the time of the offer.

See N. Y. Code, § 385.

1. If judgment is entered upon the *cognovit* and by its authority, then the amount acknowledged would have been the sum of the judgment; but where, upon complaint and answer denying the allegations thereof, the acknowledgment issued as evidence, interest may be given by way of damages. *Hirschfield v. Franklin*, 6 Cal. 607.

2. A *cognovit* is good as an admission *in pais* after answer is filed. *Id.*

3. The true meaning of the Statute, (Practice Act, sec. 390) authorizing the Clerk to enter judgment upon an offer on the part of defendant to suffer judgment for a specified sum, etc., is, that he can enter judgment only when the offer is made after action is brought by the filing of the complaint, and while pending; and where a party hands to the Clerk the complaint, offer of judgment and notice of acceptance of the offer, at the same time, and thereupon the Clerk enters judgment, it is void. *Crane v. Hirschfelder*, 17 Cal. 582.

4. It is presumed that an offer may now be made in every action. *Sterne v. Bently*, 3 How. Pr. 331; 1 Cal. R. 109.

5. An offer signed by the Attorney is good. *Id.*

6. If the cause is tried before the five days expire, the rights of the parties are in all respects as if no offer had been made. *Ruggles v. Fogg*, 7 How. 324.

7. Where a defendant makes an offer, he is precluded from taking any steps in the cause until the acceptance is served. *Walker v. Johnson*, 8 How. Pr. 240.

8. An offer may be made by one of several defendants, who have been served, so as to admit of a judgment against the individual property of the one making the offer, and the joint property of all the defendants. *Owll v. McLaughlin*, 10 N. Y. Leg. Obs. 316.

9. Where A, B, and C, were sued jointly as joint debtors, and A was the only defendant served, and he made an offer under section three hundred and eighty-five, for plaintiff to take judgment for four hundred and ten dollars, and costs, the plaintiff accepted the offer, and entered judgment against all the defendants as joint debtors: *Held*, regular. *Leppman v. Jackson*, 1 Code Rep. N. Y. 161; *Emery v. Emery*, 9 How. Pr. R. 130.

10. In an action against partners, where all had been served with summons, the plaintiff, before time to answer had expired, entered judgment against all, upon an offer made by one without special authority from the others. The offer was signed in the firm name D. M. & Co., and with his individual name: *Held*, that the judgment should be vacated on motion of junior judgment creditors. 1. "The defendant," on whose offer judgment may be entered, according to section three hundred and eighty-five of the Code, means a sole defendant, or all the defendants who have been served. (*La Farge v. Chilson*, 3 Sandf. 752.) 2. A copartner has no implied authority to make such offer. (*Everson v. Gehrman*, 10 How. Pr. R. 301; *Barney v. Le Gal*, 19 Barb. 592; *Rathbun v. Drakeford*, 6 Bing. 375; *McBride v. Hagen*, 1 Wend. 326.) And if he were their attorney in fact, he must be approved by the Court as such. (*Le Roy v. Heily*, 1 Duer, 637.) And his signature must be supported by proof embodied in the record. 3. An offer signed in the firm name is no authority to the Clerk to enter judgment against the partners. 4. The judgment could not be sustained against the partner who made the offer,

because the roll showed that it was entered before the time of the others to answer had expired. *Barney v. Le Gal*, 19 Barb. 592; *Bridenbecker v. Mason*, 16 How. Pr. R. 203.

11. Though, in such case, it might be deemed that the parties defendant had, by laches, lost their right to move against the judgment, still it was void against junior judgment creditors. *Barney v. Le Gal*, 19 Barb. 592; *Bridenbecker v. Mason*, 16 How. Pr. R. 203.

12. It seems, that had M. employed an attorney to appear for all the defendants, and he had served the offer as such attorney, without fraud or collusion, the judgment would have been sustained. *Grazebrook v. McCredie*, 9 Wend. 437; *Grisewold v. Grisewold*, 14 How. Pr. R. 466; *Barney v. Le Gal*, 19 Barb. 592; *Bridenbecker v. Mason*, 16 How. Pr. R. 203.

13. **Costs.**—Plaintiff not entitled to where he recovers an amount less than offered by defendant. *Pomeroy v. Hulin*, 7 How. R. 161.

14. Where plaintiff failed to obtain a more favorable judgment than the amount was offered, but in the trial extinguished a set off, which with the verdict exceeded the defendant's offer, the plaintiff was entitled to full costs. *Ruggles v. Fogg*, 7 How. 324.

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## TITLE XI.

### OF WITNESSES, AND OF THE MANNER OF OBTAINING EVIDENCE.

#### CHAPTER I.—Of Witnesses.

SEC. 391. *All persons may be witnesses except as specified in this chapter.*

392. *No person shall be excluded for his religious belief.  
When a person may be excluded for interest.*

393. *The test of interest. A party may call the adverse party.*

394. *Persons who shall not be witnesses.*

395. *Husband and wife shall not be witnesses for or against each other.*

396. *Attorney shall not be examined as to a communication made by a client, without consent.*

397. *Nor a priest as to any confession.*

398. *Nor a physician as to any information necessarily acquired in that capacity.*

399. *Nor a public officer as to communications made in official confidence.*

400. *The Judge or any juror may be a witness.*

401. *When witness does not speak English, an interpreter shall be sworn.*

§ 391. *All persons may be witnesses except as specified in this chapter.*

All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding.

J. P.

1. The whole tendency of the modern decisions with reference to the competency of witnesses, is to relax rather than to extend the rule of exclusion. *Smith v. Richmond*, 19 Cal. 476.

2. An agent is a competent witness to testify as to his authority in performance of acts for his reputed principal. *Tomlinson v. Spencer*, 5 Cal. 291.

3. **Books of account.**—In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm, by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the Court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books, and had no clerk, the book was sufficiently proved to be admitted in evidence. *Landis v. Turner*, 14 Cal. 573.

§ 392. *No person shall be excluded for his religious belief. When a person may be excluded for interest.*

[1854.] No person offered as a witness shall be excluded on account of his opinions on matters of religious belief; nor shall any person be excluded on account of his interest in the event of the action or proceedings, except in the following cases:

1st. When he is a party to the action or proceeding, or the action or proceeding is prosecuted or defended for his immediate benefit;

2d. When his interest is a present, certain, and vested interest.

See § 393, J. P.

1. **Generally.**—Sections three hundred and ninety-two and three hundred and ninety-three of the Practice Act are to be construed so as to exclude testimony, when the witness would be directly benefitted by it. *Jones v. Post et al.*, 4 Cal. 14.

2. Under our statute, no person can be excluded as a witness on account of interest in the event of the action, unless he may be a party, or one for whose immediate benefit the action is prosecuted or defended. *Tomlinson v. Spencer*, 5 Cal. 291.

3. A party has a right to resort to other witnesses to prove that an adverse witness offered was the party in interest, with a view to exclude his testimony. 1 Phil. Ev. 134; Cow. and H. Notes, note 250; 2 Cow. 968; *Healey v. Kingsley*, 4 E. D. Smith's C. P. R. 286.

4. **Opinion on matters of religious belief.**—Practice Act, section three hundred and ninety-two, providing "that no person offered as a witness shall be excluded on account of his opinion on matters of religious belief," and the fourth section, article first of the Constitution, to the same effect, mean that a witness is competent without respect to his religious sentiments or conviction—the law leaving his competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions. *Fuller v. Fuller*, 17 Cal. 605.

5. **Parties to the action or proceeding.**—A defendant may be examined as a witness on behalf of his codefendant, if their interests are divisible. *Beach v. Covillaud*, 2 Cal. 237.

6. Where the evidence of one defendant is as available to himself as to his codefendant, this Court has always held, that one is incompetent to testify for the other, and the same rule prevails under like circumstances where the declaration is in tort, and the defendants are charged as joint tort-feasors. *Johnson v. Henderson*, 3 Cal. 368.

7. Under the statute a defendant cannot be a witness for his codefendant, where the defense is general and would operate in its

§ 391. *All persons may be witnesses except as specified in this chapter.*

All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding.

J. P.

~~1. The whole tendency of the modern decisions with reference to the competency of witnesses is to exclude them. *Smith v. Rick*~~

*Amendments to Secs. 391, 392, 393.—Passed April 27th, 1863.*

[Takes effect sixty days after passage.]

§ 391. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding. Facts which have heretofore caused the exclusion of testimony, may still be shown, for the purpose of affecting its credibility.

§ 392. No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto, or otherwise; but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce*, or by deposition, or upon a commission, in the same manner and subject to the same rules of examination as any other witness, on behalf of himself, or either or any of the parties to the action or proceeding.

§ 393. No person shall be allowed to testify under the provisions of section three hundred and ninety-two, where the adverse party, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person; and nothing contained in said section shall affect the laws in relation to the attestation of any instrument required to be attested; nor shall anything contained in said section render any person who, in a criminal proceeding, is charged with the commission of any public offense, competent or compellable to give evidence therein for or against himself.

5. **Parties to the action or proceeding.**—A defendant may be examined as a witness on behalf of his codefendant, if their interests are divisible. *Beach v. Covillaud*, 2 Cal. 237.

6. Where the evidence of one defendant is as available to himself as to his codefendant, this Court has always held, that one is incompetent to testify for the other, and the same rule prevails under like circumstances where the declaration is in tort, and the defendants are charged as joint tort-feasors. *Johnson v. Henderson*, 3 Cal. 368.

7. Under the statute a defendant cannot be a witness for his codefendant, where the defense is general and would operate in discharge of both. *Buckley v. Mani-fee*, 3 Cal. 441.

8. And the rule is the same where but one defendant is upon trial, the other not having been served with process in time. *Id.*

9. A defendant who has suffered default is not a competent witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. *Washburn v. Alden et al.*, 5 Cal. 463.

10. A defendant who has not been served with process is not a competent witness for his codefendants in an action of trespass. *Gates v. Nash*, 6 Cal. 192.

11. After judgment against a party, the action is ended as to him; he is no longer a party, and then his competency must be tested by his interest. *Vance v. Collins*, 6 Cal. 435.

12. If a party be improperly joined as defendant, the Court or jury, upon application, should first pass upon his case; and after he is discharged, he could then be examined as a witness for the other defendant. *Domingo v. Getman*, 9 Cal. 97.

13. Case where one of several defendants was admitted as witness for plaintiff. *Dupuy v. Leavenworth*, 17 Cal. 262.

14. One who is not necessarily a party, is not disqualified as a witness by being made a party. *Keteltas v. Penfold*, 4 E. D. Smith's C. P. R. 122, 134.

15. Party for whose benefit the action is prosecuted or defended. See § 422.

16. **Interest; present, certain and vested.**—A witness, in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.

17. Where the defeat of plaintiff would inevitably result in S. obtaining the fund in controversy: *Held*, that S., although not a party to the suit, was incompetent as a witness. *McEwen v. Johnson*, 7 Cal. 258.

18. The liability of a witness to either party, in case of a certain result of the suit, must be legal and not moral, and the consequent interest present, certain and vested, in order to exclude the witness. *Jones v. Love*, 9 Cal. 68.

19. In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness whose wife is a sister and heir of the deceased is incompetent upon the ground of interest. *Lisman v. Early*, 12 Cal. 282.

20. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners in the ditch was taken by the plaintiff, and subsequently, and before the trial, the witness conveyed, by deed, his interest in the ditch to plaintiff: *Held*, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball v. Gearhart*, 12 Cal. 27.

21. A witness is not disqualified because of a mere expectation of deriving from a suit some advantage to which he is not legally entitled. *Coghill v. Boring*, 15 Cal. 213.

22. The interest which renders a party incompetent as a witness is a legal interest in the event of the suit; and it is the fact of interest, not the supposition of the party that he is interested, which incapacitates him. *McCabe v. Hand*, 18 Cal. 496.

23. **Agent.**—Where a party, assuming to act as agent for the payee and indorser of a note, waived demand and notice for his principal, and was the only person from whom a knowledge of the transaction could be obtained: *Held*, that



he is *ex necessitate* a competent witness for the holder of the note in suit against the maker and indorser. *Mills v. Beard*, 19 Cal. 158.

24. In such cases the fact of interest does not exclude the witness, his competency constituting an exception to the general rule of exclusion on the ground of interest. *Id.*

25. **Servant.**—In an action where the defense set up is the negligence of the servant of plaintiff, the servant is not a competent witness for his employer. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 253.

26. **Clerk of the Court.**—Where the Clerk of a Court is called as a witness to prove the records of the Court of which he is Clerk, it is no objection that he is interested in the result of the suit. *Price v. Dunlap*, 5 Cal. 483.

27. **Broker.**—A broker whose commissions or compensation depends on his principal's recovery is incompetent as a witness, on the ground that he is directly interested in the event. *Shaw v. Davis*, 5 Cal. 466.

28. **Maker of a note.**—In an action against the indorser of a note, where demand and notice are not averred, but where it is averred that the maker paid the indorser the value of the note; and that the indorser agreed to pay it, the maker of the note is not a competent witness to prove those facts. *Palmer v. Tripp's administrator*, 6 Cal. 82.

29. The maker of a note, after judgment against him, is a competent witness for the indorser, because his interest is equally balanced. *Vance v. Collins*, 6 Cal. 435.

30. **Indorser, payee.**—In a suit, therefore, by an indorsee against the maker of a note, the indorser, not being a party, is a competent witness for the plaintiff, where it does not appear that the suit is prosecuted for his immediate benefit. *Tomlinson v. Spencer*, 5 Cal. 291.

31. An indorser of a note is incompetent as a witness to establish the lien of a holder of the note upon the property of the maker, being directly interested to have the lien established. *Soule v. Dawes*, 6 Cal. 473.

32. In a suit against the maker of a note, or the acceptor of a bill, the indorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 85.

33. In a suit against the maker of a note, the payee or indorser is a competent witness for either party. *Smith v. Richmond*, 19 Cal. 476.

34. **Members of incorporations.**—In an action by a company of miners to recover possession of a mining claim, and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. *Packer v. Heaton*, 9 Cal. 568.

35. A person who has been a stockholder in an incorporated company, but ceased to be such holder before suit was brought, is a competent witness in an action in the name of such company. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.

36. A member of the incorporation, at the commencement of a suit brought by it, cannot become a witness for it on the trial by selling out his shares of stock after suit brought. He is personally liable for his proportion of the costs, and his competency as a witness can only be restored by actual payment of the entire costs of the case—those due, and those to become due. *Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 265.

37. A party who permits himself to stand on the books of a water company, incorporated under the statute of this State, as a stockholder, and holds the office of Secretary, to which no person but a stockholder is eligible, is not a competent witness for the company in an action against it for overflowing plaintiff's mining claim. He is liable for the debts of the company, and therefore interested. *Wolf v. St. Louis Independent Co.*, 15 Cal. 319.

38. The fact that the stock was held in his name in trust for another—the transfer having been made simply to him to become an officer of the company—does not relieve him from responsibility. *Id.*

39. **Witness in actions concerning lands.**—On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee, and without having any interest himself therein. *Peralta v. Castro*, 6 Cal. 354.

40. And where such trustee had executed a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby by the *cestui que trust*, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Id.*

41. A vendor by a quit-claim deed is a competent witness in an action of ejectment by the vendee against a third party, to recover possession of the premises. *Johnson v. Parks*, 10 Cal. 336.

42. The lessor of plaintiffs is a competent witness in an action for a trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *McCormick v. Bailey*, 10 Cal. 230.

43. In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up and converting the gold-bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe v. Bradley*, 12 Cal. 226.

44. But in real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Blackwell v. Atkinson*, 14 Cal. 470.

45. In ejectment for mining claims and for damages, defendant's entry being laid October 21st, 1859, and the suit brought in March, 1860, plaintiff called a witness, W., who was one of the owners of the claims from the fall of 1858 to February, 1860, when he sold to plaintiff, during which time the damages accrued: *Held*, that the witness was competent as against the objection that he was interested, because a recovery by plaintiff would not necessarily give a right of action to the witness for damages accruing before the conveyance and recovery; and the record of such recovery would not be conclusive, if any, proof of his title. *Grady v. Early*, 18 Cal. 108.

46. Von S., Deputy United States Surveyor, was called as a witness on behalf of plaintiff in ejectment on a patent, to prove that the premises in controversy were within the calls of the patent, and in the occupation of the defendant, and on his *voir dire* stated that he was married to a daughter of plaintiff's, and had, about two years previously, and after the patent was issued, purchased, in his own name, land covered by the grant, upon the confirmation of which the patent issued. Defendant objected to the witness as interested in the grant as part owner, and hence, that he was disqualified: *Held*, that the ownership of the witness in parcels of land covered by the grant, other than the premises in controversy, did not disqualify him; that he could not, from such ownership, gain or lose by the direct legal operation and effect of the judgment; nor could the judgment be legal evidence for or against him in any other action. *Mott v. Smith*, 16 Cal. 533.

47. Where a mining company sues for damages for trespasses committed on their claims during January, February and March, but had sold out to the company on the first of April, is not a competent witness for the plaintiff, even though when offered, the witness executes an assignment to plaintiffs of his interest in the damages. *Columbus Co. v. Dayton Co.*, 18 Cal. 615.

48. Ejectment for a quarter section of land. Defendant disclaimed as to all except the north half of the section, eighty acres, within which he had thirty acres inclosed, and called the "Old Field." Defendant offered his brother, A. R. Whitesides, as a witness to prove defendant's prior possession of that part of the north half of the section outside of the "Old Field." Witness on his *voir dire* said he lived with defendant, was interested in the crops which were in the "Old Field" only, and had no interest whatever in the balance of the land: *Held*, that the witness was competent; that his being interested in farming within the "Old Field" did not make him interested in the result of the litigation as to the land outside of that field. *Licks v. Whitesides*, 18 Cal. 700.

49. **Vendor of goods.**—As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Howe v. Scannell*, 8 Cal. 325.

50. But where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible; and a *fortiori*, his sworn statement. *Id.*

51. Where the vendee of a lot of wheat released his vendor from all damage by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige v. O'Neal*, 12 Cal. 483.

52. If the action concern the title to personal property, the vendor is a competent witness for a second or any subsequent vendee, the objection going only to his credibility. *Blackwell v. Atkinson*, 14 Cal. 470.

53. Generally, a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. *Id.*

54. Where goods are seized by the Sheriff on an execution against G., and the owner of the goods so in the Sheriff's hands assigns them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a *chose in action*, but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 213.

55. See *ante*, § 4, page 10, Nos. 83-94, as to assignors and vendors.

§ 393. *The test of interest. A party may call the adverse party.*

[1854.] The true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him in some other action; but nothing in this, or in the last section, shall prevent a party calling as a witness the adverse party to the action, or a person whose interest is adverse, nor a party being a witness in the cases mentioned in section four hundred and twenty-three.

See § 392. J. P.

§ 394. *Persons who shall not be witnesses.*

[1854.] The following persons shall not be witnesses:

1st. Those who are of unsound mind at the time of their production for examination;

2d. Children under ten years of age, who, in the opinion of the Court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3d. Indians, or persons having one-half or more of Indian blood, and negroes, or persons having one-half or more of negro blood, in an action or proceeding to which a white person is a party;

4th. Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the Governor, or such judgment has been reversed on appeal.

J. P.

1. There is no precise age within which children are excluded from giving testimony. Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge. *The People v. Bernal*, 10 Cal. 66.

2. It is for the Court to decide the question of their competency when they are

*Id.*

assumption is that they possess the req-  
assumption is

*Amendment to Sec. 395.—Passed April 27th, 1863.*

[Takes effect sixty days after passage.]

§ 395. A husband may be a witness for or against his wife, and a wife may be a witness for or against her husband, and where husband and wife are parties to an action or proceeding, they, or either of them, may be examined as witnesses in their own behalf, or in behalf of each other, or in behalf of any of the parties thereto, the same as any other witness; but this section shall not apply to cases of divorce, neither shall any husband or wife be competent or compellable to disclose any communication made to him or her by the other during marriage.

J. P.

ing the right of determining for himself the question of privilege, and province, but that of the Court; and his refusal to produce the papers is a contempt. *Mitchell's Case*, 12 Abb. Pr. R. 249.

3. An attorney having papers of his client in his possession in Court, which are required as evidence in the case, is not privileged from producing them; at least, for the purpose of identification. *The People ex rel. Mitchell v. The Sheriff of N. Y.*, 7 Abb. Pr. R. 96.

§ 397. *Nor a priest as a confession.*

A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

J. P.

§ 398. *Nor a physician as to any information necessarily acquired in that capacity.*

[1861.] A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, in any suit or prosecution against a physician, or surgeon, for malpractice, if the patient, or party suing or prosecuting, shall give such consent, and any such witness shall give testimony, then such physician or surgeon defendant, may call any other physicians or surgeons as witnesses, on behalf of defendant without the consent of such patient, or party suing or prosecuting.

J. P.

1. The provisions of 2 (N. Y.) Rev. Stat. 406, § 73, forbidding disclosure of confidential communications by a patient to his physician, do not preclude the physician from testifying to the nature of the disease and the character of the treatment, when he brings an action to recover for his services. *Kendall v. Grey*, 2 Hilt. 300.

§ 399. *Nor a public officer as to communications made in official confidence.*

A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

J. P.

§ 400. *The Judge, or any juror, may be a witness.*

The Judge himself, or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.

J. P.

*Amendment to Sec. 401.—Passed April 25th, 1863.*

[Takes effect sixty days after passage.]

§ 401. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any Court or Judge to appear before such Court or Judge to act as interpreter in any action or proceeding. The summons shall be served and returned in like manner as a subpoena. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly.

*and when signs and issues.*

SEC. 402. *Subpoenas may require witnesses alone, or to bring books, etc., but not more than thirty miles if out of the county.*

403. *Subpoena shall be issued, in what cases.*

404. *Service of subpoena.*

405. *Service on concealed witness.*

406. *Person present may be required to testify without subpoena.*

407. *A witness duly served shall attend as required.*

408. *Witness shall answer pertinent questions; exceptions.*

409. *Penalty for disobedience to subpoena, etc.*

410. *Witness disobeying subpoena shall forfeit one hundred dollars and all damages.*

411. *If witness fail to attend, the Court may issue a warrant.*

412. *If witness be a prisoner, an order for his examination or production may be made.*

413. *Such order can be made only upon affidavit.*

414. *When imprisoned, witness may be produced or his deposition taken.*

415. *Witness duly subpoenaed exempt from arrest in a civil action.*

SEC. 416. *Arrest of witness under subpoena void; may be discharged on affidavit.*

§ 402. *Subpoenas may require witnesses alone, or to bring books, etc., but not more than thirty miles if out of the county.*

[1855.] A subpoena may require not only the attendance of the person to whom it is directed, at a particular time and place, to testify as a witness, but may also require him to bring any books, documents, or other things under his control, to be used as evidence. No person shall be required to attend as a witness before any Court, Judge, Justice, or any other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

J. P.

§ 403. *Subpoena shall be issued, in what cases.*

[1859.] The subpoena shall be issued :

1st. To require attendance before a Court, issue therein, it shall be issued in the name of the Court before which the attendance is required ;

2d. To require attendance out of the County, Justice, or other officer authorized to administer oaths in any matter under the laws of this State, by the Judge, Justice, or any other officer authorized to administer oaths ;

3d. To require attendance before a Court of a foreign country, or of any other State in the United States, or of any other district or county within this State, it may be issued by any Judge, or Justice of the Peace, in places within their respective jurisdictions, with like power to enforce attendance, and upon certificate of contumacy to said Court, to punish contempt of their process, as such Judge or Justice could exercise if the subpoena directed the attendance of the witness before their Courts in a matter pending therein.

J. P.

Sec. 402. The subpoena shall be issued as follows :  
First.—To require attendance before a Court, or at the trial of an issue thereon, it shall be issued under the seal of the Court before which the attendance is required, or in which the issue is pending.  
Second.—To require attendance out of the County, before a Judge, Justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this State, it shall be issued by the Judge, Justice, or any other officer before whom the attendance is required.  
Third.—To require attendance before a Commissioner appointed to take testimony by a Court of a foreign country, or of the United States, or of any other State in the United States, or of any other district or county within this State, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any Judge or Justice of the Peace in places within their respective jurisdictions, with like power to enforce attendance, and upon certificate of contumacy to said Court, to punish contempt of their process as such Judge or Justice could exercise if the subpoena directed the attendance of the witness before their Courts in a matter pending therein.

— MAY — UNITED

§ 404. *Service of subpoena.*

The service of a subpoena shall be made by showing the original, and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person.

J. P.

§ 405. *Serving on concealed witness.*

If a witness be concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any Court or Judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the Sheriff of the county serve the subpoena; and the Sheriff shall serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

J. P.

§ 406. *Person present may be required to testify without subpoena.*

A person present in Court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such Court or officer.

J. P.

§ 407. *A witness duly served shall attend as required.*

It shall be the duty of a witness, duly served with a subpoena, to attend at the time appointed, with any papers under his control required by the subpoena, to answer all pertinent and legal questions; and, unless sooner discharged, to remain till the testimony is closed.

J. P.

1. Courts are apt to take too narrow a view of the rights of cross-examination, confining it to the subject matter of the examination in chief. Undoubtedly the cross-examination cannot go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject matter, may be fully tested. *Jackson v. Feather River & Gibsonville Water Co.*, 14 Cal. 18.

2. It is settled in this State, that where the veracity of a witness is impeached only by facts stated by him on his cross-examination, or by proof of contradictory



statements in regard to the matter of his testimony, made by him on other occasions, evidence of his general good character for truthfulness is inadmissible. (3 Hill, 309; 5 Den. 106; 1 Park. Cr. 310; 3 Seld. 378; 17 Barb. 489; overruling *People v. Rector*, 19 Wend. 569; *Carter v. The People*, 2 Hill, 317.) *Frost v. McCargar*, 29 Barb. 617.

§ 408. *Witness shall answer pertinent questions.*

A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which shall have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony.

J. P.

1. Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself. *Ex parte Rowe*, 7 Cal. 184.

2. Being sentenced on a conviction for petit larceny, does not disqualify as a witness. *People v. Shay*, 10 Abb. Fr. R. 413.

§ 409. *Penalty for disobedience to subpoena, etc.*

Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the Court or officer issuing the subpoena, or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out.

J. P.

§ 410. *Witness disobeying subpoena shall forfeit one hundred dollars and all damages.*

A witness disobeying a subpoena shall also forfeit to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend; which forfeiture and damages may be recovered in a civil action.

J. P.

§ 411. *If a witness fail to attend, the Court may issue a warrant.*

In case of failure of a witness to attend, the Court or officer issuing the subpoena, upon proof of the service thereof, and of the fail-

ure of the witness, may issue a warrant to the Sheriff of the county to arrest the witness, and bring him before the Court or officer where his attendance was required.

J. P.

§ 412. *If a witness be a prisoner, an order for his examination or production may be made.*

If the witness be a prisoner, confined in a jail or prison within this State for any other cause than a sentence for felony, an order for his examination in the prison upon deposition, or for his temporary removal and production before a Court or officer for the purpose of being orally examined, may be made as follows :

1st. By the Court itself, in which the action or special proceeding is pending;

2d. By a Judge of the Supreme Court, District Court, or County Judge of the county where the action or proceeding is pending, if before a Judge or other person out of Court.

J. P.

§ 413. *Such order can be made only upon affidavit.*

Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

J. P.

§ 414. *When imprisoned witness may be produced or his deposition taken.*

If the witness be imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for felony, his production may be required. In all other cases, his examination, when allowed, shall be taken upon deposition.

J. P.

§ 415. *Witness duly subpoenaed exempt from arrest in a civil action.*

Every person who has been in good faith served with a subpoena to attend as a witness before a Court, Judge, Commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest, in a

civil action, while going to the place of attendance, necessarily remaining there, and returning therefrom.

J. P.

1. This section does not exempt him from obeying any ordinary process of the Court, *e. g.*, to attend and answer concerning his property, under a supplementary writ. *Page v. Randall*, 6 Cal. 32.

§ 416. *Arrest of witness under subpoena void, may be discharged on affidavit.*

The arrest of a witness contrary to the last section, shall be void; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exoneration, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit, stating:

1st. That he has been served with a subpoena to attend as a witness before a Court, officer, or other person; specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2d. That he has not been thus served by his own procurement, with the intention of avoiding an arrest.

3d. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena. The affidavit may be taken by the officer, and shall exonerate him from liability for discharging the witness when arrested.

J. P.

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CHAPTER III.—*Of the examination of parties to an action or proceeding, and of persons for whose immediate benefit such action or proceeding is prosecuted or defended.*

SEC. 417. *No action for discovery of evidence shall be allowed.*

418. *A party may be examined for the adverse party in the same manner as any other witness.*

419. *Such examination may be rebutted.*

420. *Penalty for refusal of a party to testify.*

421. *Party so called may be examined on his own behalf. When adverse party may be called in rebuttal.*

SEC. 422. *A person for whose benefit an action is prosecuted may testify as if a party. And a party may be examined on his own behalf on notice.*

*Amendment to Sec. 417.—Passed April 27th, 1763.*

[Took effect sixty days after passage.]

§ 417. No action to obtain a discovery under oath, in aid of the prosecution or defense of another action or proceeding, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner provided by this and the foregoing chapter.

2. This section ...  
ceeding supplementary to an execution.

*Section 418.—Repealed April 27th, 1863.*

*ty in the*

[Takes effect sixty days thereafter.]

as a witness, at the instance of ... of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, and he may be examined on a commission.

J. P.; N. Y. Code, § 390.

1. Under our statute, the plaintiff may call as a witness any one of the adverse parties to the action, where there are several, and they are sued as joint tort-feasors. He is not bound to call all if he call one. *Rosenbaum v. Hernberg*, 17 Cal. 602.

2. In an action against defendants for damages for conspiring together to defraud plaintiffs of certain goods—the conspiracy being successfully carried out by defendants, obtaining and disposing of the goods—H., one of the defendants, made a voluntary appearance, but interposed no defense. The other defendants answered and contested the case: *Held*, that H. was a competent witness for plaintiffs under our statute; and probably so at common law, especially as he did not object to testifying. *Rosenbaum v. Hernberg*, 17 Cal. 602.

3. A party who calls an adverse party to testify makes him a witness, and waives his incompetency to be heard for himself, or for his codefendant or coplaintiff. *Turner v. McIlhenny*, 8 Cal. 575.

4. On the trial of a cause, where defendant calls the plaintiff as a witness after his examination in chief, he has a right to testify on his own behalf, generally, as to the matters in issue. *Drake v. Eakin*, 10 Cal. 312.

5. Under the Code, a party to an action may not only be examined at the option of the adverse party, but may also be compelled to produce, on such examination,

civil action, while going to the place of attendance, necessarily remaining there, and returning therefrom.

J. P.

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423. *Copartners, when parties, may be examined to prove items of account.*

§ 417. *No action for discovery of evidence shall be allowed.*

No action to obtain a discovery under oath, in aid of the prosecution or defense of another action or proceeding, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

J. P.; N. Y. Code, § 389.

1. A judgment was had in the District Court in favor of the appellant, and against the respondent: *Held*, that after judgment against him, it is too late for plaintiff to file his bill for discovery in aid of his defense, on the ground that it was meritorious, and lies entirely within the knowledge of the judgment creditor. *Norris v. Denton*, 2 Cal. 378.

2. This section does not apply to prevent an examination of a debtor in a proceeding supplementary to an execution. *Dunham v. Nicholson*, 2 Sand. 636; *Id.* 231.

§ 418. *A party may be examined for the adverse party in the same manner as any other witness.*

A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, and he may be examined on a commission.

J. P.; N. Y. Code, § 390.

1. Under our statute, the plaintiff may call as a witness any one of the adverse parties to the action, where there are several, and they are sued as joint tort-feasors. He is not bound to call all if he call one. *Rosenbaum v. Hernberg*, 17 Cal. 602.

2. In an action against defendants for damages for conspiring together to defraud plaintiffs of certain goods—the conspiracy being successfully carried out by defendants, obtaining and disposing of the goods—H., one of the defendants, made a voluntary appearance, but interposed no defense. The other defendants answered and contested the case: *Held*, that H. was a competent witness for plaintiffs under our statute; and probably so at common law, especially as he did not object to testifying. *Rosenbaum v. Hernberg*, 17 Cal. 602.

3. A party who calls an adverse party to testify makes him a witness, and waives his incompetency to be heard for himself, or for his codefendant or coplaintiff. *Turner v. McIlhenny*, 8 Cal. 575.

4. On the trial of a cause, where defendant calls the plaintiff as a witness after his examination in chief, he has a right to testify on his own behalf, generally, as to the matters in issue. *Drake v. Eakin*, 10 Cal. 312.

5. Under the Code, a party to an action may not only be examined at the option of the adverse party, but may also be compelled to produce, on such examination,

books, papers, etc., which are under his control. *Brett v. Brecknam*, 32 Barb. 655.

6. The proper mode of practice in such cases is to proceed with the examination of the party, until it shall be ascertained whether he has under his control any, and if any, what books or papers admissible as evidence in the action, or necessary for the purposes of the examination; and then for the Judge before whom the examination is had to direct what books and papers shall be produced, and when and where. *Brett v. Brecknam*, 32 Barb. 655.

§ 419. *Such examination may be rebutted.*

The examination of a party thus taken, may be rebutted by adverse testimony.

J. P.; N. Y. Code, § 393.

§ 420. *Penalty for refusal of a party to testify.*

If a party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission when required, his complaint, answer or reply, may be stricken out, and judgment be taken against him; and he may be also, in the discretion of the Court, proceeded against as in other cases for a contempt.

J. P.; N. Y. Code, § 394.

§ 421. *Party so called may be examined on his own behalf. When adverse party may be called in rebuttal.*

A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answer thereto; or discharge, when his answer would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be so received.

J. P.; N. Y. Code, § 395.

1. Where a party is called as a witness by the other side, and, on his cross-examination, testifies to new matter, his opponent may be called on his own behalf, in rebuttal of this new matter. *Jones et al. v. Love et al.*, 9 Cal. 68.

2. On the trial of cause, where defendant calls the plaintiff as a witness, after his examination in chief, he has a right to testify on his own behalf, generally, as to the matters in issue. *Drake v. Eakin*, 10 Cal. 312.

3. When the defendant calls the plaintiff as a witness, and the latter testifies to new matter not responsive to the enquiries put to him by the defendant, the defendant may offer himself as a witness on his own behalf, in respect to such new matter, but his testimony must be limited to an explanation or contradiction of such new matter. *Dwinelle v. Henriquez*, 1 Cal. 387.

§ 422. *A person for whose benefit an action is prosecuted may*

*testify as if a party. And a party may be examined on his own behalf on notice.*

[1861.] A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be ~~examined as a witness~~ in the same manner and subject to the same ~~rules as a party.~~ And a party

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contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for. But such assignor shall not be permitted to be examined on behalf of any person deriving title through or from him, against an assignee or an executor, or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination; nor at least ten days, notice of such intended examination of the assignor, specifying the points upon which he is intended to be



books, papers, etc., which are under his control. *Brett v. Brecknam*, 32 Barb. 655.

6. The proper mode of practice in such cases is to proceed with the examination of the party, until it shall be ascertained whether he has under his control any, and if any, what books or papers admissible as evidence in the action, or necessary for the purposes of the examination; and then for the Judge before whom the examination is had to direct what books and papers shall be produced, and when and where. *Brett v. Brecknam*, 32 Barb. 655.

*Amendment to Sec. 420.—Passed April 27th, 1863.*

[Takes effect sixty days after passage.]

§ 420. If an adverse party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission, when required, his complaint or answer may be stricken out, and judgment be taken against him; and he may be also, in the discretion of the Court, proceeded against as in other cases for a contempt.

*W. A., N. Y. Code, § 394.*

*§ 420.*

*Sections 421, 422, and 423.—Repealed April 27th, 1863.*

[To take effect sixty days thereafter.]

... adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be so received.

J. P.; N. Y. Code, § 395.

1. Where a party is called as a witness by the other side, and, on his cross-examination, testifies to new matter, his opponent may be called on his own behalf, in rebuttal of this new matter. *Jones et al. v. Love et al.*, 9 Cal. 68.

2. On the trial of cause, where defendant calls the plaintiff as a witness, after his examination in chief, he has a right to testify on his own behalf, generally, as to the matters in issue. *Drake v. Eakin*, 10 Cal. 312.

3. When the defendant calls the plaintiff as a witness, and the latter testifies to new matter not responsive to the enquiries put to him by the defendant, the defendant may offer himself as a witness on his own behalf, in respect to such new matter, but his testimony must be limited to an explanation or contradiction of such new matter. *Dwinelle v. Henriquez*, 1 Cal. 387.

§ 422. A person for whose benefit an action is prosecuted may

*testify as if a party. And a party may be examined on his own behalf on notice.*

[1861.] A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party. And a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness; but such examination shall not be had, nor shall any other person for whose immediate benefit the same is prosecuted or defended be so examined, unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor or legal representative of a deceased person, nor unless ten days' notice of such intended examination of the party or person interested, specifying the points upon which such party or person is intended to be examined, shall be given in writing to the adverse party, except that in special proceedings of a summary nature, such reasonable notice of such intended examination shall be given as shall be prescribed by the Court or Judge. And when notice of such intended examination shall be given in an action or proceeding in which the opposite party shall reside out of the jurisdiction of the Court, such party may be examined by commission issued and executed as now provided by law; and whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received. When an assignor in a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, and to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for. But such assignor shall not be permitted to be examined on behalf of any person deriving title through or from him, against an assignee or an executor, or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination; nor at least ten days, notice of such intended examination of the assignor, specifying the points upon which he is intended to be

examined, shall be given in writing to the adverse party. This section shall not be held to impair or in any way affect the existing provisions of law by which persons of Indian or negro blood are excluded from being witnesses.

J. P.; N. Y. Code, §§ 396, 399.

1. **"Person is living," construction of.**—A corporation is a "person living," within the provision of section three hundred and ninety-nine of the Code, allowing the conditional examination of a party, where the adverse party, or person in interest, is living. *Wallace v. The Mayor, etc., of New York*, 9 Abb. Pr. R. 40; *Wright v. N. Y. Central R. R. Co.*, 28 Barb. 80.

2. The provision of section three hundred and ninety-nine of the Code—that a party shall not be examined as a witness, unless the adverse party or person in interest is living—does not exclude a party from being a witness when the opposite party is a corporation. *Johnson v. McIntosh*, 13 Barb. 367.

3. Where one of two defendants dies, and the action goes on against the other without substitution of new parties, and it does not appear that the survivor is less cognizant of the facts as to which the plaintiff offers himself as a witness, it is not a case in which the adverse party or person in interest is not living; but the plaintiff is entitled to testify in his own behalf. *Bigelow v. Mallory*, 17 How. Pr. R. 427.

4. It makes no difference that the deceased party had indemnified the one who is the survivor against the result of the litigation. *Id.*

5. A corporation is a living person within the meaning of the Code of 1857; and where it is a party to an action, the opposite party is entitled to be examined on his own behalf under the provisions of that Code. *La Farga v. Exchange Fire Ins. Co.*, 22 N. Y. (8 Smith) 352.

6. Whether the rule would apply when the officers are dead with whom the transactions were had concerning which the testimony is offered—*Query. Id.*

7. **Representative of a deceased person, who is.**—An executor under a will proved in another State, suing upon a note made to his order as executor, and indorsed by him in blank, is not the representative of a deceased person within section three hundred and ninety-nine of the Code, and the adverse party may be examined against him. *Buckingham v. Andrews*, 12 Abb. Pr. R. 322.

8. In the provision of section three hundred and ninety-nine of the Code of Procedure, allowing parties to be examined as witnesses, except that parties shall not be examined against parties who are representatives of a deceased person and the witness, the words "representatives of a deceased person" mean executors or administrators. *McCray v. McCray*, 12 Abb. Pr. R. 1.

9. A party whose interest in lands in suit is that of a guardian in socage, an heir or a dowress, is not a representative of the decedent through whom she claims, within the meaning of that section. *Id.*

10. **When the wife may testify.**—Section three hundred and ninety-nine of the Code is sufficiently comprehensive to authorize the wife to be a witness in her own behalf, and the husband in his own behalf, whether they be plaintiffs or codefendants, or whether the action be brought by one against the other. *Shoemaker v. McKee*, 19 How. Pr. 86; disapproving of 36 Barb. 612; 15 How. Pr. 165, 196; but see amendment of § 399, Laws of 1861, 787, ch. 459, § 12.

11. In an action against husband and wife upon a debt of the husband, for which the wife's separate estate is liable collaterally, and where the object of the action is to enforce the demand against such separate estate, both having been served, and the action being at issue as against both, the wife may be examined in the method prescribed by sections three hundred and ninety and three hundred and ninety-one of the Code as a substitute for a bill of discovery. So far as she could have been compelled to make discovery upon a bill properly framed before the Code, she can be required to answer now. *Draper v. Henningsen*, 16 How. Pr. R. 281.

12. **Landlord.**—*It seems* that under section three hundred and ninety-nine of

the Code, a landlord is not a competent witness for himself in "summary proceedings to recover the possession of the land." *Marseilles v. Bulger*, 19 How. Pr. 34.

13. The defendant was examined as a witness in his own behalf on the trial. At the time the trial was had, he could not, by law, testify in his own behalf without giving at least ten days' previous notice of his intended examination. The paper served, which was at the trial held to be a notice of his intended examination, was not signed by him or his attorney: *Held*, that such paper was not a notice. It was only a memorandum. [17 How. Pr. 192.] And the error in allowing him to testify in his own behalf, without any sufficient notice being given of his intended examination, entitled the plaintiff to a new trial. *Dewitt v. Leonard*, 19 How. Pr. 182.

14. **Generally.**—Cases in which a party cannot be examined as a witness in his own behalf. Code, § 399, as amended 1859, Voorhies' 6th ed. 532.

15. What is the proper practice in obtaining the examination of an adverse party in the various cases allowed by the Code, stated. *Draper v. Henningsen*, 1 Bosw. 611.

16. The rule that if a witness, with the fault of the party producing him, fail to answer, his testimony is to be stricken out, is applicable to the case of a party testifying in his own behalf. *Burnett v. Phalon*, 12 Abb. Pr. R. 186.

17. When a party was examined as a witness in his own behalf, before the amendment of section three hundred and ninety-nine of the Code, it was proper to recall him to contradict the other party, although not on a point specified in the notice. *Rushmore v. Hall*, 12 Abb. Pr. R. 420.

§ 423. *Copartners, when parties, may be examined to prove items of account.*

[1854.] Parties may be witnesses on their own behalf when the action is brought for the settlement of, or in relation to, the business and accounts of a copartnership then existing, or which had previously existed between them, to prove vouchers or items of account under one hundred dollars.

J. P.

1. A codefendant is not a competent witness, under section four hundred and twenty-three of the Practice Act, upon an issue where his testimony would enure to his own benefit. *Sparks v. Kohler*, 3 Cal. 300.

2. He would be a competent witness to show that his codefendant was not his partner; for this, in a legal point of view, would be against his interest. *Id.*

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#### CHAPTER IV.—On affidavit.

SEC. 424. *Affidavits to be used in this State, before whom may be taken in this State.*

425. *If made in another State of the United States, before whom taken.*

426. *If made in a foreign country, before whom taken.*

427. *Certificate of Clerk, if taken before a Judge of a Court out of this State.*

§ 424. *Affidavits to be used in this State, before whom may be taken in this State.*

An affidavit to be used before any Court, Judge or officer of this State, may be taken before any Judge or Clerk of any Court, or any Justice of the Peace, or Notary Public in this State.

J. P.

1. Where the affidavit of a juror is sworn to be correct by another party, it may be treated as the latter's original affidavit. *Wilson v. Berryman*, 5 Cal. 44.

2. Courts take judicial notice of the official character of Justices of the Peace, in their own States. And an affidavit, in which the official character of the Justice before whom it is taken, does not appear is good. *Ede v. Johnson*, 15 Cal. 53.

3. An affidavit need not be signed by the party making it. *Id.*

§ 425. *If made in another State of the United States, before whom taken.*

An affidavit taken in another State of the United States, to be used in this State, shall be taken before a Commissioner appointed by the Governor of this State to take affidavits and depositions in such other State, or before any Judge of a Court of Record having a seal.

J. P.

§ 426. *If made in a foreign country, before whom taken.*

An affidavit taken in a foreign country to be used in this State, shall be taken before an Ambassador, Minister or Consul of the United States, or before any Judge of a Court of Record having a seal, in such foreign country.

J. P.

§ 427. *Certificate of the Clerk, if taken before a Judge of a Court out of this State.*

When an affidavit is taken before a Judge of a Court in another State, or in a foreign country, the genuineness of the signature of the Judge, the existence of the Court, and the fact that such Judge is a member thereof, shall be certified by the Clerk of the Court, under the seal thereof.

J. P.

CHAPTER V.—*Of depositions taken in this State.*

SEC. 428. *Depositions of witnesses in this State may be taken in certain cases.*

429. *Depositions may be taken before a Judge, etc., upon notice to the adverse party.*

430. *Manner of taking depositions. May be used by either party on the trial.*

431. *A deposition may be read at any stage of the action or proceeding.*

§ 428. *Depositions of witnesses in this State may be taken in certain cases.*

The testimony of a witness in this State may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2d. When the witness resides out of the county in which his testimony is to be used;

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

J. P.

1. Taking testimony by depositions is in derogation of the common law, and must not only be done by the proper officer, but every requirement of law must be complied with. *McCann v. Beach*, 2 Cal. 25.

2. All the requisitions of the statute, in relation to the taking of depositions, must be strictly complied with; and this must appear upon the deposition to entitle it to admission. *Dye v. Bailey*, 2 Cal. 383.

§ 429. *Depositions may be taken before a Judge, etc., upon notice to the adverse party.*

[1859.] Either party may have the deposition taken of a witness in this State before any Judge or Clerk, or any Justice of the Peace, or Notary Public in this State, on serving on the adverse

party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is one mentioned in the last section. At any time during the forty days immediately after the service of summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the Clerk of the Court where the action is pending. Such notice shall be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless for a cause shown a Judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

J. P.

1. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills v. Dunlap*, 3 Cal. 94.

2. The decision of such motion rests in the sound discretion of the Court, who must decide upon the sufficiency, or otherwise, of the grounds upon which such motion is made. *Id.*

3. Proof of notice to take a deposition, where the written notice was defective, was held good, when made by parol and conforming substantially to the statute. *Id.*

4. An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short. *Jones v. Loe*, 9 Cal. 68.

5. An order to take testimony by deposition should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence. *Ellis v. Davis*, 5 Cal. 453.

6. Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Williams v. Chadbourne*, 6 Cal. 559.

7. It being objected by plaintiff to a deposition: 1st, that the copy of the order of the Judge, fixing the time for taking it, did not mention the notice to be given the adverse party; 2d, that no correct copy of said order was served; 3rd, that no sufficient notice to take the deposition was ever given; the objection was overruled, "because the original order of the Judge, made on affidavit, fixed the time of notice at three days, and because plaintiff's counsel acknowledged service in writing of a copy thereof March 8th, 1859, more than three days before the taking of the deposition:" Held, that there was no error; that the objection assigned was matter for the Court, and its discretion was properly exercised; that reasonable notice should be given of the time and place of taking testimony: but what is reasonable notice, depends on the particular circumstances. *Atwood v. Fricot*, 17 Cal. 37.

8. To make the testimony of a witness admissible, he must be competent at the time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. *Kimball v. Gearhart*, 12 Cal. 27.

§ 430. *Manner of taking depositions; may be used by either party on the trial.*

Either party may attend such examination, and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness, and corrected by

him in any particular, if desired; it shall then be subscribed by the witness, certified by the Judge or officer taking the deposition, inclosed in an envelop or wrapper, sealed, and directed to the Clerk of the Court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the Judge or officer to the Clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial, that the witness continues absent or infirm to the best of the deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of the witness.

J. P.

1. Where a deposition is taken *ex parte*, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring v. Hill*, 6 Cal. 17.

2. There is nothing in the statute that requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence. *Dye v. Bailey*, 2 Cal. 383.

3. The certificate of the Notary as set forth in the case is sufficient. *Mills v. Dunlap*, 3 Cal. 94.

4. Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination. *Lawrence v. Fulton*, 19 Cal. 683.

5. **When a deposition may be excluded.**—A whole deposition cannot be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions; otherwise, any error in permitting the questions will be waived. *Higgins v. Wortell*, 18 Cal. 330.

6. It is not essential to the certificate of a Notary to a deposition taken before him, that it state that the deposition was read over to the witness before signing. But if the certificate states that the deposition was corrected by the Notary, under the direction of the witness, it is a sufficient compliance with the statute, because showing, by necessary implication, that the deposition was either read to or examined by the witness. *Id.*

7. If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing. *Myers v. Casey*, 14 Cal. 419.

8. Where such rule of a District Court requires the notice as above, unless the exceptions appear on the face of the deposition, the meaning is that the objection—not the objectionable matter—must appear on the face of the deposition. *Id.*

9. It is no ground for the exclusion of a deposition that it was noticed to be



taken before the County Judge, but was taken before the County Clerk. *Williams v. Chadbourne*, 6 Cal. 559.

10. A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial. *Mills v. Dunlap*, 3 Cal. 94.

§ 431. *A deposition may be used at any stage of the action or proceeding.*

When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it.

J. P.

1. The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other. *The People v. Kotler*, 5 Cal. 72.

2. *Query*: Whether a party can object, on second trial to the reading of a deposition which he suffered his adversary to read on the first trial without objection. *Myers v. Casey*, 14 Cal. 542.

3. The object of this section is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken. *Turner v. McIlhenny*, 8 Cal. 567.

#### CHAPTER VI.—*Of depositions taken out of this State.*

SEC. 432. *Testimony of a witness out of the State may be taken after service of summons or issue joined.*

433. *Such deposition shall be taken upon commission issued under seal, upon notice; to whom to issue.*

434. *Proper interrogatories, direct and cross, may be prepared or may be waived by the parties.*

435. *Authority and duties of commissioner.*

436. *Trial shall not be postponed for return of commission, except upon showing of materiality of evidence and due diligence.*

§ 432. *Testimony of a witness out of the State may be taken after service of summons or issue joined.*

The testimony of a witness out of the State may be taken by deposition, in an action, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

J. P.

1. Diligence must be used in applying for a commission. *Pierson v. Holbrook*, 2 Cal. 598.

2. It is admissible, notwithstanding the witness may have returned to the State since his examination, if he is not within the State at the time of the trial. *Markoe v. Aldrich*, 1 Abbott, 55.

3. On the execution of a commission, the parties have a right to appear by counsel. Cross interrogatories cannot be withdrawn unless by mutual consent. A witness cannot shield himself from answering a cross interrogatory by a reference to his previous answer to a direct one. *Union Bank v. Torrey*, 2 Abbott, 269; 5 Duer, 626.

§ 433. *Such deposition shall be taken upon commission issued under seal upon notice; to whom to issue.*

The deposition of a witness out of this State shall be taken upon commission issued from the Court, under the seal of the Court, upon an order of the Judge, or Court, or County Judge, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon between the parties, or if they do not agree, to any Judge or Justice of the Peace selected by the officer granting the commission, or to a commissioner appointed by the Governor of this State to take affidavits and depositions in other States.\*

J. P.

\* STATUTES OF 1858, 22.

The first section of an Act entitled "An Act empowering the Governor to appoint Commissioners of Deeds, and defining the duties of such officers," passed March 20th, 1850, is hereby amended so as to read as follows: "The Governor may, when in his judgment it may be necessary, appoint in each of the United States, and in each of the territories and districts of the United States, and in each foreign State, territory, and colony, one or more commissioners, to continue in office four years, unless removed by the Governor. Every such commissioner shall have power to administer oaths, and to take depositions and affidavits to be used in this State; and also to take the acknowledgment or proof of any deed or other instrument to be recorded in this State."

STATUTES OF 1861, 553.

CHAPTER CCCCXCIV.—Act to authorize the taking of Depositions in Foreign Countries.

SEC. 1. The testimony of a witness in a foreign country may be taken by deposition in any civil action pending in any of the District Courts of this State, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

SEC. 2. The deposition of a witness in a foreign country shall be taken upon commission issued from a District Court, under the seal thereof, upon an order of such Court or the Judge thereof, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person or persons agreed upon between the parties, or if they do not agree, to any person or persons nominated by the Court or Judge granting the commission.

SEC. 3. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the Court or Judge, granting the order for the commission at a day fixed in the order, may be annexed to the commission; or when the parties agree to that mode, the examination may be without written interrogatories.

SEC. 4. The commission shall authorize the Commissioner to administer an oath to the witness and to take his deposition in answer to the interrogatories; or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the Court in a sealed or closed envelop, directed to the Clerk, or other person designated or agreed upon, and forward to him by mail; or other usual channel of conveyance.

SEC. 5. When a deposition has been once taken in accordance with the provisions of this act, it may be subject to legal objections, be read in evidence in any stage of the same action or proceeding, by either party, and shall then be deemed the evidence of the party reading it.

SEC. 6. This act shall take effect from and after its passage.

1. The Court have no power to order the original instrument belonging to the plaintiff, and on which his action is brought, to be annexed to a commission to take testimony in another State, issued at the instance of the defendants, although they provide for first taking a photograph of the instrument at the defendants' expense. *Bulter v. Lee*, 19 How. Pr. 383.

§ 434. *Proper interrogatories may be prepared, or may be waived, by the parties.*

Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the Judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or when the parties agree to that mode, the examination may be without written interrogatories.

J. P.

§ 435. *Authority and duties of commissioner.*

The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories; or when the examination is to be without interrogatories, in respect to the question in dispute; and to certify the deposition to the Court, in a sealed envelop directed to the Clerk, or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

J. P.

§ 436. *Trial shall not be postponed for return of commission, except upon showing of materiality of evidence and due diligence.*

A trial or other proceeding shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the Court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

J. P.

1. Where a party applied for a continuance to enable him to take the deposition of an absent witness, and the proof which was designed to be obtained would constitute no defense to the plaintiff's claim; the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 470.

2. The answer of defendant was filed May 10th, 1852, and the application for a continuance to take testimony in New York was filed June 14th, 1852, during which interval no attempt was made to sue out a commission for the purpose: *Held*, that this is not sufficient diligence to entitle the party to his application. *Pierson v. Hallbrook*, 2 Cal. 598. See § 432.

CHAPTER VII.—*Of proceedings to perpetuate testimony.*

SEC. 437. *Testimony may be perpetuated.*

438. *The applicant shall present verified petition to a Judge. Granting and service of order.*

439. *Upon due service of notice, the depositions of the witnesses named may be taken.*

440. *Manner of taking depositions and filing thereof.*

441. *Affidavits, etc., filed with depositions shall be prima facie proof of the facts therein stated.*

442. *Manner of using such depositions, if trial be had.*

§ 437. *Testimony may be perpetuated.*

[1859.] The testimony of a witness or witnesses may be taken and perpetuated as provided in this chapter.

J. P.

§ 438. *The applicant shall present verified petition. Granting and service of order.*

[1859.] The applicant shall present to a District or County Judge a petition verified by the oath of the applicant, stating:

1st. That the applicant expects to be a party to an action in a Court in this State, and in such case, the name or names of the person or persons whom he expects will be adverse parties; or,

2d. That the proof of some fact or facts is necessary to perfect the title to property in which he is interested, or to establish marriage descent, heirship, or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated, he may not know the parties to such suit; and,

3d. The name or names of the witness or witnesses to be examined at his or their place of residence, and a general outline of the facts expected to be proved. The Judge to whom such petition is presented shall make an order allowing the examination and prescribing the notice to be given, which notice, if parties are known and reside in this State, shall be personally served on them; and if unknown, such notice shall be served on the Clerk of the county where the property to be affected by such evidence is situ-

ated, and a notice thereof published in some newspaper to be designated by the Judge making the order.

J. P.

§ 439. *Upon due service of notice, the depositions of the witnesses named may be taken.*

[1859.] Upon proof of service of the notice as provided in the last section, it shall be the duty of the Judge before whom the depositions are taken, to proceed to take the depositions of the witnesses named in said petition, upon the facts therein set forth; and the taking of the same may be continued from time to time in the discretion of the Judge.

J. P.

§ 440. *Manner of taking depositions and filing thereof.*

[1859.] The examination shall be by question and answer, unless the parties otherwise agree. The deposition, when taken, shall be carefully read to, and subscribed by, the witness, then certified by the Judge, and immediately thereafter filed in the office of the Clerk of the District Court of the county where the same was taken, together with the order for the examination, the petition on which the same was granted, and the proof of service of notice.

J. P.

§ 441. *Affidavits, etc., filed with depositions shall be prima facie proof of the facts therein stated.*

[1859.] The affidavits or other proof filed with the depositions, or certified copies thereof, shall be *prima facie* evidence of the facts therein stated.

J. P.

§ 442. *Manner of using such depositions, if trial be had.*

[1859.] If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove or tend to prove, upon proof of the death or insanity of the witness or witnesses, or if his or their inability to attend the trial by reason of age, sickness, or settled

infirmity, the deposition or depositions, or certified copies thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the examination.

J. P.

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CHAPTER VIII.\*—*Administration of oaths and affirmations.*

SEC. 443. *Authorizing certain persons to administer oaths.*

444. *A person may be sworn according to the peculiar ceremonies of his religion.*

445. *A witness may, instead of taking an oath, make an affirmation.*

443. *Authorizing certain persons to administer oaths.*

Every Court of this State, every Judge or Clerk of any Court, every Justice of the Peace, and every Notary Public, and every officer authorized to take testimony, or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations.

J. P.

444. *A person may be sworn according to the peculiar ceremonies of his religion.*

When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

J. P.

445. *A witness may, instead of taking an oath, make an affirmation.*

Any witness who desires it may, at his option, instead of taking

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\* STATUTES OF 1862, 106.

*An Act concerning the administration of oaths. Passed May 1st, 1862.*

1. That all officers of this State, authorized by law to administer oaths or affirmations, may certify the same under their hands, without fixing to such certificates their seals of office.

2. That all oaths or affirmations heretofore administered by any officer of this State, and by him certified under his hand, without the seal of office, shall be as effectual for all purposes as if such seal had been affixed to such certificate.

an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form : You do solemnly affirm that the evidence you shall give in this issue, (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury, equally with a false oath.

J. P.

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CHAPTER IX.—*Inspection of documents, and miscellaneous provisions as to records and writings.*

SEC. 446. *The Court may, upon notice, order a party to grant an inspection of a book, etc., relating to the merits of a case.*

447. *When there may be evidence of the contents of a writing other than itself.*

448. *Introduction in evidence of a writing altered in a material part.*

449. *Proof of a judicial record of this State, or of the United States.*

450. *Proof of the records, etc., of any other State of the United States.*

451. *Proof of a judicial record of a foreign country.*

452. *Proof of a copy of a judicial record of a foreign country.*

453. *Printed copies of statutes, etc., of another State or Government, published by authority, are presumptive evidence of such laws.*

454. *Impression of a seal of a Court or public office.*

§ 446. *The Court may, upon notice, order a party to grant an inspection of a book, etc., relating to the merits of a case.*

Any Court in which an action is pending, or a Judge thereof, or a County Judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper, in his possession, or under his control, containing evidence relating to the

merits of the action, or the defense therein. If compliance with the order be refused, the Court may exclude the book, document or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the Court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.

N. Y. Code, § 388. Notice, sufficiency of, see § 447.

1. The Practice Act authorizes the Court to make an order directing a party to produce books and papers in Court. *Burnstead v. Empire Mining Co.*, 5 Cal. 299.

2. On an application for discovery, enough must be shown to satisfy the Court that there is reason to believe that the documents sought do in fact contain material evidence. Merely showing a belief that the papers in general of the plaintiff contain matter which would help the defense, is not sufficient. It must also appear that the party does not possess other means of proof. *Pegram v. Carson*, 10 Abb. Pr. R. 340.

3. A petition by one party for an order directing the other party to make a discovery of books and papers in his possession will not be granted, when it prays for a discovery generally of all the books, papers and correspondence of the adverse party, containing entries during a period of several years, relating to purchasers of a specific commodity. A petition must show that entries affecting or throwing some light on the matters in controversy exist, or enough to call upon the adverse party to answer whether they do or not; that they are material, and state enough, if not denied, so that the Court can see they are material, in addition to stating the other matters prescribed by the rules regulating such application. *Casaard v. Hinman*, 6 Duer, 695.

4. A petition for a discovery should be denied, where it appears that the petitioner might have access to the books and papers without an order—e. g. where it appears that he is one of the Directors of a corporation to which the books and papers belong, and that the custodian of them holds them subject to the control of the Board thereof. *Charlick v. Flushing Railroad Co.*, 10 Abb. Pr. R. 130.

5. In an action to recover money received by the defendant, as agent or factor of the plaintiff, an inspection of the defendant's books was asked by the plaintiff, to enable him to frame his complaint: *Held*, 1st. That the defendant must render a sworn account from the time of the last account rendered by him before the action was commenced, or deposit with the Clerk such of his books as contained the items of such account; 2d. That no discovery could be allowed for the purpose of contradicting the accounts already rendered. *Rubery v. Burns*, 5 Bosw. 683.

6. An affidavit to resist a motion that books and papers be disposed for inspection, on the ground that the affiant has not possession of them, is not sufficient, if it is evasive in not showing how he parted with possession. *Hicks v. Charlick*, 10 Abb. Pr. R. 129.

7. An order (Code, § 388) granting an inspection or copy of books, papers and documents relating to the merits of the suit, rests in the discretion of the Judge; and the Court will not on appeal review the question whether, under all the circumstances, the case was a proper one for the exercise of the power. *White v. Monroe*, 12 Abb. Pr. R. 357.

§ 447. *When there may be evidence of the contents of a writing other than itself.*

There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:



1st. When the original has been lost or destroyed ; in which case proof of the loss or destruction shall first be made ;

2d. When the original is in possession of the party against whom the evidence is offered, and he fails to produce it, after reasonable notice ;

3d. When the original is a record, or other document, in the custody of a public officer ;

4th. When the original has been recorded, and a certified copy of the record is made evidence by statute ;

5th. When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

1. **First subdivision.**—In suit by the assignee of a book account, the assignor is a competent witness to prove to the Court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents. *Caulfield v. Sanders*, 17 Cal. 569.

2. The facts and circumstances of the destruction must be shown, in the first instance, to the Court, to enable it to judge of the propriety of admitting or refusing the secondary evidence. The same principle which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence. *Bayley v. Administrator of McMickle, Eaton et al.*, 9 Cal. 430.

3. It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But, if the destruction was voluntarily and deliberately made by the owner, or with his assent, the admissibility of the evidence will depend upon the cause or motive of the party, in effecting or assenting to the destruction. *Id.*

4. Per BURNETT, J.—*Query*: Whether affidavits are admissible to prove the destruction of notes, when the plaintiff, and his witnesses, and copayee, can be examined in open Court. *Id.*

5. As to parol evidence to prove contents of instruments destroyed by fire. *Collier v. Corbett*, 15 Cal. 183.

6. A copy of a notice posted on a mining claim to show its extent is not admissible in evidence, if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases. *Lombardo v. Ferguson*, 15 Cal. 372.

7. Where the record book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents. *Ames v. Hoy*, 12 Cal. 11.

8. Proof that a notice upon a mining claim has been torn, and that the remaining portion is (as the witness thinks) illegible and defaced, is enough to introduce a copy of it. *Dunning et al. v. Rankin et al.*, Jan. 1862.

9. E. Lawrence testified that he once had a deed in his possession, and at first thought that F. had it now, but that he had received a letter from F. saying that the witness had not returned said deed to him ; now he was satisfied it was not in F.'s possession. The plaintiff also made oath he had never had the deed : Held to be insufficient to introduce parol proof of its contents. *Lawrence v. Fulton*, Jan. 1862.

10. **Party may testify to loss of instrument.**—Whatever may have been the reason originally assigned, the true ground upon which the testi-

mony of parties is admitted to prove the destruction of written instruments, is this: that the testimony relates to matters preliminary and incidental, is addressed solely to the Court, and does not affect the issue to be tried by the jury. Upon such matters, the rule as to the incompetency of parties and interested persons does not apply. The testimony proves nothing in the cause, it only prepares the way for the introduction of proof. The existence and contents of the instruments must be established by distinct and competent evidence. *Bagley v. Eaton*, 10 Cal. 126.

11. The rule is well settled that a party has a right to testify on his own behalf to prove the loss of original documents, as a predicate for the introduction of secondary evidence to prove their contents. *Grass Valley Quartz Min. Co. v. Stackhouse et al.*, 6 Cal. 413.

12. Proof of the loss of the instrument may be by the party's own affidavit, to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question. But this the party may show by his own oath. Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of law must be complied with. Depositions may be taken by Notaries Public, but only when the witness resides out of the county where the suit is pending, and a commission is regularly sued out and directed to the Notary. *McCann v. Beach*, 2 Cal. 25.

13. In this State, the testimony may be given orally or offered by affidavit. The convenience of the parties and of the Court will sometimes suggest one course and sometimes another. Either course may be adopted, and either course will avail. *Bagley v. Eaton*, 10 Cal. 126.

14. **Diligence necessary.**—Evidence that the library and papers of the party were destroyed by fire, except a few papers, unaccompanied by evidence of search for the particular paper, is insufficient, for the paper in question may be one of those saved from the fire. *Folsom's Executors v. Scott*, 6 Cal. 460.

15. Mere evidence of search is not sufficient, for the search may not have been diligent. *Id.*

16. In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derails title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and, in the absence of other evidence, his affidavit should have been offered. *Fallon v. Dougherty*, 12 Cal. 104.

17. It is sufficient, *prima facie*, to show that the grantee, or his representative or assignee, did not have the grant, and that it was not in the place where it was last seen. *Pierce v. Wallace*, 18 Cal. 165.

18. **Second subdivision.**—Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so. *Poole & Wife v. Gerrard*, 9 Cal. 593.

19. Parol proof of a written contract and assignment thereof in writing, not admissible, so as to charge the assignee, without notice to produce the original or accounting for its loss. *Grimes v. Fall*, 15 Cal. 63.

20. Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear. *Burke et al. v. Table Mountain Co.*, 12 Cal. 403.

21. **Form and sufficiency of notice.**—On the day of trial, plaintiffs served upon the defendants notice to produce on trial "the written agreement, cancelling the lease alleged to have been made between A. B. Laforge and the Table Mountain Water Company—said agreement having been made by A. B. Laforge and the Table Mountain Water Company—or parol evidence will be given of its contents." The defendants not producing the agreement, parol evidence was admitted on trial of its contents. The notice was held sufficient. *Burke v. Table Mountain Water Co. and Laforge*, 12 Cal. 403.

22. In this case it was shown that the paper was on the day of trial in the possession of one of the attorneys of the defendant. *Id.*

23. The sufficiency of notice to produce a paper shown to be in the possession of a party is a question of discretion; and if it were impossible to procure it between the time of giving notice and the trial, that fact should be made to appear. *Id.*

24. Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document denied is enough. *Id.*

25. **Third subdivision.**—Certified copies of grants made by the Surveyor General of the United States are inadmissible in evidence, unless the absence of the originals is accounted for. *Hensley v. Tarpey*, 7 Cal. 288.

26. An affidavit, showing that the Surveyor General has adopted a rule refusing to allow the originals to be taken from the files, is a sufficient predicate. *Id.*

27. Where, to suit for goods sold and delivered, defendant pleads his discharge in insolvency: *Held*, that in support of his plea he can offer in evidence certified copies of the decree, and of each of the papers composing the record of the insolvent proceedings separately; and that these papers need not all be attached together, and the whole certified as one record. *Goldstone v. Davidson*, 18 Cal. 41.

28. A certificate of the Surveyor General, that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 544.

29. A duly certified copy of a Mexican grant, from the U. S. Surveyor General's office, is admissible in evidence against the objection that the absence of the original is not accounted for. But it is admissible only when the original itself would be. The statute (Acts of 1857, p. 317) simply removes the objection to the copy as secondary evidence. *Id.*

30. The *expediente*, consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican Government, is as much an original document as the grant delivered to the grantee. *BALDWIN, J. —Gregory v. McPherson*, 13 Cal. 562.

31. **Fourth subdivision.**—A Recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the Notary did affix his seal. *Jones v. Martin*, 16 Cal. 165.

32. A power of attorney, not affecting real estate, is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution. *Stevens v. Irwin*, 12 Cal. 306.

33. Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. *Brotherton v. Mart*, 6 Cal. 488.

34. To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the Court. *Smith v. Brannan*, 13 Cal. 107.

35. The Act of 1851, section twenty-first, gives to papers properly recorded the like effects as originals, but it does not dispense with proof of execution. *Powell's Heirs v. Hendricks*, 3 Cal. 427.

36. Section twenty-first of the Act of March, 1851, giving to copies of papers from the County Recorder's office the like effect as evidence as originals, does not dispense with the production of the originals if they can be obtained: it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original. *Macy v. Goodwin*, 6 Cal. 579.

### § 448. *Introduction in evidence of a writing altered in a material part.*

The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part mate-

rial to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

§ 449. *Proof of a judicial record of this State or of the United States.*

A judicial record of this State, or of the United States, may be proved by the production of the original, or a copy thereof, certified by the Clerk, or other person having the legal custody thereof, under the seal of the Court, to be a true copy of such record.\*

See § 655.

1. There is no attempt by this section to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit. *Macy v. Goodwin*, 6 Cal. 579.

2. To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept. *Kyburg v. Perkins*, 6 Cal. 674.

3. In ejectment, plaintiff—relying upon a Mexican grant and a decree of United States Board of Land Commissioners—offered in evidence a copy of the decree taken from the office of the United States Surveyor General, with a certificate by the Surveyor General that “the foregoing is a correct copy of the decree of confirmation made by said Board of Commissioners in the case therein mentioned, together with the endorsements thereon, as the same is on file in my office,” defendant objecting that the copy was not properly certified: *Held*, that the certificate complies sufficiently with the statute, the terms of which need not be literally pursued. *Young v. Emerson*, 18 Cal. 416.

\*STATUTES OF 1867, 108.

*An Act concerning Evidence. Passed March 26th, 1868.*

1. Whenever the public records, books or papers in the “Custody” of any Collector of Customs of the United States, or of the Register or Receiver of any land office of the United States within this State, or in the office of the Surveyor General of the United States for the State of California, or in the office and in the custody of the Clerk of the Circuit, or any District Court of the United States for the State of California, shall be required as evidence in any Court of this State, copies of such records, books or papers, duly certified by the proper officer under his hand and official seal, where he has a seal, shall be received in evidence with the same force and effect as the originals.

STATUTES OF 1867, 317.

*An Act concerning certified copies of certain instruments in writing. Passed April 29th, 1867.*

1. Copies of all papers lately belonging to the United States Board of Commissioners for the settlement of private land claims in California, and on file in the office of the Surveyor General of the United States for the State of California, and all copies of documents and papers belonging to said Surveyor's office, which copies shall have been duly certified to be true copies by said Surveyor, shall be received and read in evidence in the same manner and with like effect as the originals.

1. The provisions of this section sustained. *Natoma Water Co. v. Clarkin*, 14 Cal. 544.

2. Duly certified copies of deeds regularly recorded, upon the acknowledgment or proof of execution by the party or parties thereto, subject however, to all the legal exceptions that might be taken to the original if produced, shall be received in evidence in all the Courts of

4. The book of accounts kept in the office of an Alcalde is admissible in evidence as a register of the acts of that officer, belonging to the office. *Kyberry v. Perkins*, 6 Cal. 673.

5. The record of a judgment of another State, if certified in conformity with the Act of Congress, is admissible in evidence in this State. *Parke v. Williams*, 7 Cal. 247.

§ 450. *Proof of the records, etc., of any other State of the United States.*

[1854.] The records and judicial proceedings of the Courts of any other State of the United States may be proved or admitted in the Courts of this State, by the attestation of the Clerk and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding Magistrate, as the case may be, that the said attestation is in due form.

1. A record also certified in conformity with the four hundred and fiftieth section of the Practice Act, would be admissible in the Courts of this State. *Parke v. Williams*, 7 Cal. 247.

2. *Held, further*, that the attachment papers of B. & Co. v. V. & Co. were admissible in favor of defendant. See facts. *Dexter v. Paugh*, 18 Cal. 372.

§ 451. *Proof of a judicial record of a foreign country.*

A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the Clerk, with the seal of the Court annexed, if there be a Clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record: together with a certifi-

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this State, without any further or other proof of the execution thereof, in the same manner and with like effect as if the originals were produced and proven; provided, it be shown, that the said originals are not under the control of the party offering the said copies, or are lost.

1. The provisions of this section sustained. *Skinker v. Flohr*, 13 Cal. 638.

3. Any person wishing, in order to obtain the benefit of this Act, to establish the genuineness of any patent for land issued by the United States, or by this State, may apply for that purpose to the District Court of the judicial district in which the patented lands, or any part thereof, are situated, after giving public notice of the time of his making said application, at least five days previous to the hearing thereof, either by one insertion in a newspaper, where there is one published in the county wherein the lands or parcels of land in said district may be situated, or in default thereof, by posting said notice on the Court house door of said county; provided, that notice shall not be required to be given in more than one county; upon proof being made that the said notice was duly given, the District Court shall proceed to inspect the patent, and upon being satisfied that it is genuine, may endorse thereupon or annex thereto an order under the seal of the Court, declaring said patent to be genuine; and if the Court be not satisfied that the said patent is genuine, then no other [order] shall be entered or made relative thereto.

4. It shall be the duty of the County Recorder of each county in this State to provide a separate book, to be called "The Record of Patents," wherein shall be recorded all patents of land or parcels of land situate in their county, whether issued by the United States or the State of California, which may be offered for record, authenticated as in the foregoing section mentioned; and a duly certified copy of any patent, recorded as aforesaid, may by offered in evidence in any proceeding or action in this State, with the same effect and force as the original duly exhibited and proven.

cate of a Judge of the Court, that the person making the certificate is the clerk of the Court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also, together with the certificate of the Minister or Ambassador of the United States, or of a Consul of the United States, in such foreign country, that there is such a Court, specifying generally the nature of its jurisdiction, and verifying the signature of the Judge and Clerk, or other legal keeper of the record.

1. In the United States, certificates of the proof and acknowledgment of deeds executed in a foreign jurisdiction, are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures. *Mott v. Smith*, 16 Cal. 533.

2. The certificates of a Notary Public or United States Consul, of acknowledgment of a deed, are *prima facie* evidence of the official character of the person by whom they are given. *Ib.*

3. The general designation, in the fourth section of the Act of April 16th, 1850, as to conveyances of any Notary Public, or any Consul of the United States, embraces Notaries and Consuls of every grade, whether principal or inferior Notary, or Consul General or Vice Consul. *Ib.*

4. *Held, further*, that the exhibits attached to the answer, consisting of copies of the pleadings and proceedings in the action in the United States Circuit Court, needed no further verification than what arises from the statements in the answer that they are such copies; that no distinct verification of them was requisite; and that were it otherwise, then the certificate of the United States Circuit Court Clerk was sufficient. *Ely v. Frisbie*, 17 Cal. 250.

§ 452. *Proof of copy of a judicial record of a foreign country.*

A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1st. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2d. That such original was in the custody of the Clerk of the Court, or other legal keeper of the same; and,

3d. That the copy is duly attested by a seal, which is proved to be the seal of the Court where the record remains, if it be the record of a Court; or if there be no such seal, or if it be not the record of a Court, by the signature of the legal keeper of the original.

See § 655.

§ 453. *Printed copies of statutes, etc., of another State or Government, published by authority, are presumptive evidence of such laws.*

Printed copies, in volumes, of statutes, code, or other written law, enacted by any other State, Territory, or foreign Government

purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the Courts and judicial tribunals of such State, Territory or Government, shall be admitted by the Courts and officers of this State, on all occasions, as presumptive evidence of such laws.

See § 655.

§ 454. *Impression of a seal of a Court or public office.*

A seal of a Court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

1. The impression of the seal may be made upon paper only. *Connolly v. Goodwin*, 5 Cal. 220; *Ross v. Bedell*, 5 Duer, 462.

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## TITLE XII.

### OF THE WRIT OF CERTIORARI AND OF MANDAMUS.

#### CHAPTER 1.—*The writ of certiorari, or review.*

SEC. 455. *The writ of certiorari; denomination of.*

456. *This writ may be issued by a superior Court to an inferior tribunal; in what cases.*

457. *The application shall be made on affidavit with notice, or without.*

458. *The writ to be directed to the inferior tribunal.*

459. *The contents of the writ.*

460. *Proceedings in the inferior Court, etc., may be stayed or not.*

461. *Service of the writ.*

462. *The review under the writ; extent of.*

463. *A defective return of the writ may be perfected. Hearing and judgment.*

SEC. 464. *Copy of judgment shall be sent to the inferior tribunal, etc.*

465. *Judgment roll. Appeals may be taken as in civil actions.*

§ 455. *The writ of certiorari, the writ of review.*

The writ of certiorari may be denominated the writ of review.

§ 456. *This writ will be issued by a superior Court to an inferior tribunal; in what cases.*

• This writ may be granted on application, by any Court of this State, except a Justice's, Recorder's, or Mayor's Court: the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the Court, any plain, speedy and adequate remedy.

See § 653.

1. **When the writ will lie.**—Where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given. *The People v. Turner*, 1 Cal. 152.

2. Where an order was made by the District Court of the Eighth Judicial District, whereby A was ordered to be imprisoned forty-eight hours, and fined five hundred dollars, for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court; and *held, further*, that a *mandamus* was not a proper remedy in such a case. *Id.*

3. An order fining and imprisoning for contempt, which does not specify on its face wherein the contempt consisted, will be reversed on *certiorari*. *Ex parte Field*, 1 Cal. 187.

4. C. obtained a judgment against H., in the County Court of Yolo county, for the restitution of certain lands: defendant appealed to the District Court, where the judgment was affirmed; and the defendant again appealed to the Supreme Court, where both judgments were reversed, and the cause remanded to the District Court for further proceedings. After the remittitur was filed in the District Court, the County Court issued a *mandamus* commanding the Clerk to issue a writ of restitution, pursuant to the original judgment in that Court; and on the petition of H., a *certiorari* was issued, to remove the proceedings to the Supreme Court: *Held*, on motion to dismiss the writ, that the writ of *certiorari* was the proper remedy; that the judgment to be enforced having been reversed by the Supreme Court, the County Court exceeded its jurisdiction in issuing the *mandamus*. *Clary v. Hoagland*, 5 Cal. 478.

5. A party against whom a judgment is sought to be enforced, although not a party to the *mandamus*, may apply for a writ of *certiorari*. *Id.*

6. The power to grant a party-license is not judicial, and its exercise properly belongs to the Supervisors. *Chard v. Harrison*, 7 Cal. 113.

7. The exercise of such a power by a County Judge is, therefore, an excess of jurisdiction, which can be properly reviewed on *certiorari*. *Id.*

8. The decision of the Board of Delegates, in the case of contested election for Chief Engineer, is a judicial decision, and subject to review by the Courts, on *certiorari*. The extent of such review is simply to inquire whether the Board has exceeded its jurisdiction. *Whitney v. Board Delegates S. F. Fire Department*, 14 Cal. 479.



9. As to how far and when the proceedings of such Boards are judicial, and hence reviewable on *certiorari*, and how far and when legislative, and hence not so to be reviewed, discussed. *Robinson v. Board Supervisors of Sacramento*, 16 Cal. 208.

10. A writ of *certiorari* will lie in the District Court, to review the action of the Board of Supervisors; otherwise, their action would be beyond control. *People v. Supervisors*, 8 Cal. 59.

11. Liability to suit has no necessary connection with ability to sue. Boards of Supervisors and bodies like them, without any legislative provision—by general law—are subject, with certain exceptions, to *mandamus*, to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

12. **When the writ will not lie.**—A *certiorari* to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board. *Wilson v. Supervisors*, 3 Cal. 386.

13. This may be done by *mandamus*, prohibition, or injunction; but their proceedings cannot be reviewed by *certiorari*. *People v. Hester*, 6 Cal. 679.

14. A writ of *certiorari* is not the proper remedy, where there has been no excess of jurisdiction. *Cutter v. Stark*, 7 Cal. 244.

15. In this case, the application for *certiorari* showing on its face that the party had an adequate legal remedy by appeal, the writ was denied. *Clary v. Hoagland*, 13 Cal. 173.

16. **The Supreme Court may grant the writ.**—This Court is strictly a Court of appellate jurisdiction; but it may exercise its appellate jurisdiction by means of the process of *mandamus*. So, also, it seems, by means of the writ of *habeas corpus*, *certiorari*, supersedeas, prohibition, &c. *The People v. Turner*, 1 Cal. 143.

17. The Supreme Court may issue a writ of *certiorari* to a District Court for the purpose of reviewing summary proceedings, in a case where no appeal would lie. *Id.* 152.

18. If inferior Courts exceed their powers, the Supreme Court, in every case within its reach, would not fail to interfere by *certiorari*. *Ex parte Hanson*, 2 Cal. 263.

19. **District Courts may grant the writ.**—An appeal does not lie from the judgment of a Justice's to the District Court. District Courts cannot entertain jurisdiction of such cases by *certiorari*, where the error complained of might be corrected by an appeal to the County Court. *Gray et al. v. Schupp*, 4 Cal. 185.

20. It is not necessary to the exercise of the power to review, that the Court issuing the writ of *certiorari* should possess appellate jurisdiction; and the writ may issue from a District Court to a County Judge. *Chard v. Harrison*, 7 Cal. 113; *People v. Board of Supervisors*, 8 Cal. 58.

21. District Judges have power to issue writs of *certiorari*, and to hear them on their return at chambers. *People v. Supervisors Marin Co.*, 10 Cal. 346.

22. **What may be reviewed.**—The review by the Courts extends to every issue of law and fact involved in the question of jurisdiction, and not only the record below, but the evidence itself, when necessary to determine a jurisdictional fact, must be returned. *Whitney v. Board of Delegates S. F. Fire Department*, 14 Cal. 479.

23. The review never extends to the merits; upon this the action of the inferior tribunal is final and conclusive. *Id.*

24. We think it is well settled that at common law *certiorari* tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. *Id.* 500.

25. Whether the decision of the inferior Court, establishing the existence of a fact essential to the exercise of its jurisdiction, can be attacked in a collateral proceeding, is a question which does not arise in the case, and in relation to which we express no opinion. We have held such a decision is subject to review upon *certiorari*. *Lowe v. Alexander*, 15 Cal. 300.

§ 457. *The application shall be made on affidavit with notice, or without.*

The application shall be made on affidavit by the party beneficially interested, and the Court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

§ 458. *The writ to be directed to the inferior tribunal, etc.*

The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the Clerk, if there be one, shall return the writ with the transcript required.

§ 459. *The contents of the writ.*

The writ of review shall command the party to whom it is directed to certify fully to the Court issuing the writ, at a specified time and place, and annex to the writ, a transcript of the record and proceedings, (describing or referring to them, with convenient certainty) that the same may be reviewed by the Court: and requiring the party in the meantime to desist from further proceedings in the matter to be reviewed.

§ 460. *Proceedings in the inferior Court may be stayed, or not.*

If a stay of proceedings be not intended, the words requiring the stay shall be omitted from the writ; these words may be inserted or omitted in the sound discretion of the Court; but if omitted, the power of the inferior Court or officer shall not be suspended, nor the proceedings stayed.

§ 461. *Service of the writ.*

The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the Court.

§ 462. *The review under the writ; extent of.*

The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board, or officer, has regularly pursued the authority of such tribunal, board, or officer.

§ 463. *A defective return of the writ may be perfected. Hearing and judgment.*

If the return of the writ be defective, the Court may order a further return to be made. When a full return has been made, the Court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below.

See § 25 of the Judiciary Act, *post*.

§ 464. *Copy of judgment shall be sent to the inferior tribunal.*

A copy of the judgment, signed by the Clerk, shall be transmitted to the inferior tribunal, board, or officer, having the custody of the record or proceeding certified up.

§ 465. *Judgment roll. Appeals may be taken as in civil actions.*

A copy of the judgment, signed by the Clerk, entered upon, or attached to, the writ and return, shall constitute the judgment roll. If the proceeding be had in any other than the Supreme Court, an appeal may be taken from the judgment in the same manner, and upon the same terms, as from a judgment in a civil action.

For costs on writ of review, see § 508.

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## CHAPTER II.—*The writ of mandate, or mandamus.*

SEC. 466. *The writ of mandamus, denomination of.*

467. *The writ may be issued by a superior Court to an inferior tribunal, etc.; in what cases.*

468. *The writ shall issue on affidavit, where there is no adequate remedy in the ordinary course of law.*

469. *Shall be either alternative or peremptory. Substance of the writ.*

470. *If the application be without notice, the alternative writ shall issue; otherwise, the peremptory. Notice and default.*

471. *The adverse party may answer under oath.*

472. *If an essential question of fact is raised, the Court may order a jury trial.*

SEC. 473. *The applicant may demur to the answer or counter-vail it by proof.*

474. *Either party may move for a new trial. Two verdicts for the same party shall be conclusive.*

475. *The Clerk shall transmit the verdict to the Court where the motion is pending, after which the hearing shall be had on motion.*

476. *If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the Court.*

•477. *If the applicant succeed, he may have damages, costs, and a peremptory mandate.*

478. *Service of the writ.*

479. *Penalty for disobedience to the writ of mandate.*

§ 466. *The writ of mandamus, denomination of.*

The writ of *mandamus* may be denominated the writ of *mandate*.

§ 467. *The writ may be issued by a superior Court to an inferior tribunal ; in what cases.*

It may be issued by any Court in this State, except a Justice's, Recorder's or Mayor's Court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

1. **When the writ will lie.**—The Court will not undertake in the first instance to supervise, direct, or control the acts or omissions of a mere ministerial officer; but when the effect of the application is to bring under review the decision of a District Court, the appellate jurisdiction given by the Constitution attaches, and may be exercised by means of the writ of *mandamus*. *The People v. Turner*, 1 Cal. 143.

2. When an order had been made by the District Court of the Eighth Judicial District, expelling certain attorneys from the Bar, on the ground that they had set at defiance the authority of the Court, and had vilified and denounced its proceedings, but no notice had been given them of the charges against them, and no opportunity afforded to make their defense: *Held*, that a writ should issue commanding the District Court to vacate the order, and restore the parties. *Id.*

3. The writ of *mandamus* is a proper remedy to compel the District Court to restore an attorney whose name has been stricken from the rolls by the order of such Court. *Id.*

4. A *mandamus* may issue to compel the Comptroller of State to account to a

member of the Legislature, for the daily compensation fixed by law. *Foster v. Pierce*, 2 Cal. 165.

5. A *mandamus* lies to compel the Judge of a District Court to enter judgment on the report of a referee. In this case there was no remedy by appeal. *Russell v. Elliott*, 2 Cal. 245.

6. But *mandamus* may be resorted to, to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under an obligation to do the specific act, and there is no adequate remedy in the ordinary course of law. *The People ex rel. v. Bell*, 4 Cal. 177.

7. Where the District Court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: *Held*, that a *mandamus* may issue to compel the District Judge to issue the attachment, the plaintiff's remedy, by appeal, being inadequate. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

8. A *mandamus* will issue from a superior to an inferior Court, to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt. *Id.*

9. The writ of *mandamus* can only be issued to compel the performance of an act or duty clearly enjoined by law, and in a case where the party has no other plain, speedy and adequate remedy. *Draper v. Noteware*, 7 Cal. 276.

10. Where Supervisors, in the exercise of their discretion, determined after hearing the testimony that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by *mandamus* or any other proper proceeding. *Thomas v. Armstrong*, 7 Cal. 287.

11. Where, pending a motion for a new trial in the District Court, the defendants violate an injunction previously issued by said District Court, this Court will issue a *mandamus* against the Judge of such District Court, to compel him to issue his attachment for contempt. *Oriman v. Dixon*, 9 Cal. 23.

12. The Supreme Court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect. *Purcell v. McKune*, 14 Cal. 231.

13. A *mandamus* may issue to compel a Judge to settle a bill of exceptions first, and then to sign it. *The People v. Lee*, 14 Cal. 512.

14. The State prison contract between the State and Estill remaining obligatory, not qualified by any legislation, it was the duty of the Controller, upon demand of relators—assignees of Estill—to have issued warrants upon the Treasurer for the sums claimed under the contract; and the performance of this can be enforced by *mandamus*. *McCauley v. Brooks*, 16 Cal. 11.

15. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the Court below to substitute another attorney in place of the one employed by Y.; the Court refused to grant the motion—the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been cancelled by the parties. Relator applies to this Court for *mandamus*: *Held*, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene, if a proper case be made, or prosecute his rights independently, or wait until a recovery, and then claim his rights under the contract with relator. *Downer v. Norton*, 16 Cal. 436.

16. The "Spring Valley Water Works" petitioned the County Judge of San Mateo County, under the Act of 1858 (Statutes 1858, § 218) to appoint Commissioners to appraise the value of certain lands "required for the purposes of the company," and the Judge, on inspection of the articles of incorporation, held that the company was not a corporation, because the articles did not show where the principal place of business of the company is to be located—the articles stating

simply that San Francisco was the place of business—and dismissed the application, and all proceedings based thereon. The company apply to the Supreme Court for a *certiorari*: *Held*, that the writ does not lie; that the dismissal of the petition for the cause assigned is not an excess of jurisdiction under the Act of 1858, and that *mandamus* from the District Court is the proper remedy. *Ex parte Spring Valley Water Works*, 17 Cal. 132.

17. To authorize a *mandamus*, it must appear not only that the performance of the act to enforce which the writ is asked is a duty resulting from the office, trust or station of the party to whom the writ is to be directed, but that the performance has been requested and refused. *People v. Romero*, 18 Cal. 89.

18. When the writ will not lie.—Where an order was made by the District Court of the Eighth Judicial District, whereby A. was ordered to be imprisoned forty-eight hours, and fined five hundred dollars for contempt of Court, without setting forth any of the facts whereon the order was based: *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court, and *Held*, further, that a *mandamus* was not a proper remedy in such a case. *The People v. Turner*, 1 Cal. 152.

19. A *mandamus* is not the proper remedy when an inferior Court refuses to enter a judgment for costs. The party complaining may appeal, or bring his action for the costs. *Peralta v. Adams*, 2 Cal. 594.

20. A *mandamus* will not lie where there is any other specific, speedy and adequate remedy. *The People v. Olds*, 3 Cal. 173.

21. *Mandamus* will not issue to compel any person, inferior officer, Court or corporation, to act in any particular manner, when such person, officer, Court or corporation is invested with discretionary power. *McDougal v. Bell*, 4 Cal. 176.

22. *Mandamus* does not lie to compel the Supervisors of a county to order a special election to fill vacancies in the office of Assessor and Sheriff. *The People v. Supervisors of Santa Barbara County*, 4 Cal. 102.

23. A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

24. A *mandamus* to a Board of Supervisors to issue a warrant for a specified sum, is irregular; it should direct them to audit the account, and issue warrants accordingly. *Tuolumne Co. v. Stanislaus Co.*, 6 Cal. 440.

25. A *mandamus* will not issue to compel the Court below to enter a decree upon the report of a referee; the remedy is by appeal. *Ludlum v. Fourth District Court*, 9 Cal. 12.

26. Where an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: *Held*, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal; but he cannot have a *mandamus* to compel the issuance of attachment for contempt. *Fremont v. Merced Mining Co.*, 9 Cal. 18.

27. A *mandamus* will not lie against the Clerk of the District Court, to compel him to issue execution on a money judgment, rendered in the Court of which he is Clerk. *Goodwin v. Glazer*, 10 Cal. 333.

28. When the Board of Supervisors of a county have canvassed the return of an election, and, in the exercise of their discretion, declared the result of an election adversely to a party claiming to have been elected, a *mandamus* will not lie, upon the application of such party, to compel the Board to issue to him a certificate of election. *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

29. A *mandamus* will not lie against a County Treasurer to compel him to pay interest due on county bonds. *People ex rel. Tallant & Wilde v. Foygs, Treasurer*, 11 Cal. 351.

30. *Mandamus* does not lie to compel the Supervisors of a county to order a special election to fill vacancies in the offices of Assessor and Sheriff. *Packard v. Supervisors of Santa Barbara County*, 14 Cal. 102.

31. Where the Judge below requires a statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence thereof, the Court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses

to proceed until such statement is furnished, *mandamus* will not lie. *Purcell v. McKune*, 14 Cal. 230.

32. In forcible entry and detainer tried in the County Court, on appeal from a Justice's Court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the Supreme Court for *mandamus* to compel the Court below to render judgment for treble damages: *Held*, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this Court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 149.

33. Where the law creating the county of Fresno provided that the County Judge to be elected "shall receive for his services such sum annually as shall be determined by the Board of Supervisors, not to exceed \$3,000, to be paid," etc.: *Held*, that the Legislature did not by this clause fix the salary of the Judge; and that *mandamus* for five hundred dollars—the difference between the \$3,000 and \$2,500, fixed by the Board some six weeks after relator's election, as the annual compensation of the Judge—does not lie. *Hart v. Johnson*, 17 Cal. 305.

34. *Mandamus* is not the proper remedy when a District Court refuses to transfer an indictment for murder pending therein to another District Court for trial—the Legislature having passed a special act directing said Court to transfer said indictment. *Smith v. Judge of the Twelfth District*, 17 Cal. 547.

35. **County Court may issue the writ.**—Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the Practice Act, can be commenced in the county where the relator resides; the provision of the statute that actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the rights or property of these persons, and not to mere omissions or neglect of official duty. *McMikan v. Richards*, 9 Cal. 365.

36. **Supreme Court.**—Application to issue *mandamus* directly from Supreme Court, on reversal of the judgment below, instead of transmitting its judgment to the District Court, to be there enforced through its process, denied—the Court being divided on the question. *McCauley v. Brooks*, 16 Cal. 11.

37. **To whom the writ will issue.**—Liability to suit has necessary connections with ability to sue. Boards of Supervisors and bodies like them, without any legislative provision—by general law—are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. *Hastings v. City and County of San Francisco*, 18 Cal. 49.

38. *Mandamus* will issue to the Governor in certain cases. *McCauley v. Brooks*, 16 Cal. 11.

39. Distinction, from political considerations, between the Governor and the inferior officers of the Executive Department, as to the issuance of this writ, stated. *Id.*

40. A *mandamus* will issue from a superior to an inferior Court, to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form a case of contempt. *Merced Mining Co. v. Fremont*, 7 Cal. 130.

41. This Court will not issue a *mandamus* to the Clerks of the District Courts in the first instance. The action, or the refusal to act, of the Clerks, in suits pending in the several Courts of the State, can only be reviewed in this Court through the ruling—in relation to such action or refusal—of the Courts of which they are the ministerial officers. *Concell v. Buckelew*, 14 Cal. 640.

42. **Generally.**—In an application for a *mandamus*, the statute does not require a replication, except when, in the discretion of the Court, it is necessary to explain or avoid facts set up in the defendant's answer. *Fowler v. Peirce*, 2 Cal. 165.

43. The distinction between writs of mandate and *quo warranto*, as held in Eng-

land, is not abolished by the statute of this State, but is fully recognized. *People v. Olds*, 3 Cal. 173.

44. Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner can be commenced in the county where the relator resides. *McMillan v. Richards*, 9 Cal. 420.

45. The proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights, or in any respect the interest of third parties. *McMillan v. Richards*, 9 Cal. 365.

46. A *mandamus* directing a Board of Supervisors to proceed and audit certain accounts of the relator, does not necessarily require the Board to allow the accounts; such Board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action. *People ex rel. Gas Co. v. Supervisors of San Francisco*, 11 Cal. 42; 6 Id. 440; 19 Id. 150.

47. Judgment may be affirmed as to the *mandamus*, and reversed as to the costs. *McDougal v. Roman*, 2 Cal. 80.

48. On *mandamus* by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale, cannot be tried. *People v. Irwin*, 14 Cal. 428.

§ 468. *The writ shall issue, on affidavit, where there is no adequate remedy in the ordinary course of law.*

The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

1. A complaint in *mandamus*, against the Comptroller, is bad if it fails to allege that there is "money not otherwise appropriated by law," out of which the compensation in question is to be paid. *Redding v. Bell*, 4 Cal. 533.

2. To supersede the remedy by *mandamus*, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. *Fremont v. Crippen*, 10 Cal. 211; 7 Id. 276.

3. Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by *mandamus*, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual. *Fremont v. Crippen*, 10 Cal. 211.

§ 469. *Shall be either alternative or peremptory. Substance of the writ.*

The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the Court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded shall be omitted, and a return day shall be inserted.



1. Where notice of the motion for a *mandamus*, and a copy of the papers on which the motion is founded, have been duly served on the District Judge, this Court may, in its discretion, issue either an alternative, or a peremptory writ, in the first instance. *The People v. Turner*, 1 Cal. 143.

§ 470. *If the application be without notice, the alternative writ shall issue, otherwise the peremptory. Notice and default.*

When the application to the Court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the Court, whether the adverse party appear or not.

§ 471. *The adverse party may answer under oath.*

On the return of the alternative, or the day on which the application of the writ is noticed, or such further day as the Court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

§ 472. *If an essential question of fact is raised, the Court may order a jury trial.*

If an answer is made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the Court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the Court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

1. In an application for a *mandamus* to compel a District Judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the District Judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill; relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the Practice Act. *People ex rel. Galvin v. The Judge of the Tenth Judicial District*, 9 Cal. 19.

2. Where an alternative *mandamus* was issued to a Justice of the Peace to com-

pel him to send up papers on appeal to the County Court, to which he answered that his fees had not been paid or tendered "prior to the service of the alternate writ": *Held*, his answer is no defense to the writ being made peremptory, as the fees may have been paid since the service of the writ. *People ex rel. Hamilton v. Harris*, 9 Cal. 571.

See § 25 of the Judiciary Act, *post*.

§ 473. *The applicant may demur to the answer or countervail it by proof.*

On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance.

§ 474. *Either party may move for a new trial. Two verdicts for the same party shall be conclusive.*

If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in section one hundred and ninety-five. The motion for a new trial may, upon reasonable notice, be brought on before the Judge of the Court in which the cause was tried, either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had.

§ 475. *The Clerk shall transmit the verdict to the Court where the motion is pending, after which the hearing shall be had on motion.*

If no notice for a new trial be given, or if given, be denied, the Clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the Court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial; after which, either party may bring on the argument of the application, upon reasonable notice to the adverse party.

§ 476. *If no answer be made, or if the answer raise no material issue of fact, the hearing shall be before the Court.*

If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section four hundred and seventy-two,

but only such matters as may be explained or avoided by a reply, the Court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the Court shall proceed to hear, or fix a day for hearing, the argument of the case.

§ 477. *If the applicant succeed, he may have damages, costs, and a peremptory mandate.*

If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the Court, or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay.

§ 478. *Service of the writ.*

The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the Court.

§ 479. *Penalty for disobedience to the writ of mandate.*

When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the Court that any member of such tribunal, corporation, or board, or such person, upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a Judge or officer who draws a salary from the State or county, a certified copy of the order shall be forwarded to the Comptroller, or County Treasurer, as the case may be, and the amount thereof may be retained from the salary of such Judge or officer. Such Judge or officer, for his willful disobedience, shall also be deemed guilty of a misdemeanor in office.

## TITLE XIII.\*

## OF CONTEMPTS AND THEIR PUNISHMENT.

SEC. 480. *Contempts, what shall be deemed.*

481. *A contempt committed in the presence of the Court may be punished summarily; when not so committed, an affidavit or statement shall be made.*
482. *A warrant of attachment to answer may issue, or notice to show cause.*
483. *Bail may be given by a person arrested under such warrant.*
484. *Sheriff shall, upon executing the warrant, arrest and detain the person until discharged.*
485. *Bail bond, form and condition of.*
486. *Office shall return warrant and bail bond, if any.*
487. *Hearing.*
488. *Judgment and penalty if guilty.*
489. *If the contempt is the omission to perform any act, the person may be imprisoned until performance.*
490. *Persons in contempt may also be indicted, if an indictable offense.*
491. *If the party fail to appear, proceedings.*
492. *Illness sufficient excuse for non-appearance of party arrested. Confinements under arrests for contempt.*
493. *Judgments and orders in such cases final. Extent of punishment.*

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\*STATUTES OF 1862, 115.

*An Act for the Punishment of Contempts and Trespasses.*

SECTION 1. Every person who shall have been, or shall be hereafter, dispossessed or ejected from, or out of, any piece, parcel, lot, or tract, of land, by the judgment, decree, or process, of any Court of competent jurisdiction, and who, not having legal right so to do, shall reënter into, or upon, or take possession of, any such land, or any part thereof, or induce, or procure, any person, not having legal right so to do, or shall aid or abet him therein, shall be deemed guilty of a contempt of the Court by which such judgment or decree was rendered, or from which such process issued, and shall be tried and punished therefor, in the same manner and form as now provided by law, in case of contempt not committed in presence of the Court or Justice of the Peace.

SEC. 2. Upon a conviction for such contempt, the Court, or Justice of the Peace, shall immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment, decree or process, to such possession of which he shall have been dispossessed by the wrongful conduct or act herein declared to be a contempt.

§ 480. *Contempt, what shall be deemed.*

The following acts or omission shall be deemed contempts :

1st. Disorderly, contemptuous, or insolent behaviour towards the Judge whilst holding Court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration, or other judicial proceeding ;

2d. A breach of the peace, boisterous conduct, or violent disturbance in presence of the Court, or its immediate vicinity, tending to interrupt the due course of a trial, or other judicial proceeding ;

3d. Disobedience or resistance to any lawful writ, order, rule or process, issued by the Court or Judge at chambers ;

4th. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness ;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order of process of such Court or Judge at chambers.

1. Contempt is defined by the statute to be the disobedience or resistance of a lawful order of the Court or Judge ; and if a Court having jurisdiction, should issue an erroneous order, a disobedience of it is a contempt. *Ex parte Cohen et al.*, 5 Cal. 494.

2. Where an order was made by the District Court of the Eighth Judicial District, whereby A was ordered to be imprisoned forty-eight hours and fined five hundred dollars for contempt of Court, without setting forth any of the facts whereon the order was based : *Held*, that a *certiorari* should issue to remove the proceedings for review into this Court ; and *held*, further, that a *mandamus* was not a proper remedy in such case. *People v. Turner*, 1 Cal. 152.

3. Where an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*. *Ex parte Tried* ; *Id.* 187.

4. It is the right and duty of the Supreme Court, on *habeas corpus*, to review the decisions of inferior Courts, in cases of contempt, as well as in others. *Ex parte Rowe*, 7 Cal. 181.

5. A commitment for contempt, for refusing to obey an unlawful order of Court, can be reviewed and set aside by a superior Court. *Id.*

6. In suit for divorce, the Court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses ; and such order may be enforced by imprisonment for contempt in case of refusal to pay. *Ex parte Perkins*, 18 Cal. 60.

7. Where in the regular course of judicial proceedings before a Court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he cannot, on application to the Supreme Court for a writ of *habeas corpus*, question the regularity of the facts ; the power of the Court below to make the order is the only question. *Id.*

8. As to the regularity of the proceedings, and the propriety of the order, the Supreme Court is not an Appellate Court, but a Court of original special jurisdiction, to discharge the applicant, when no legal cause of detention exists. *Id.*

9. The Court has power to punish a corporation for a willful disobedience of the order of the Court. *People v. Albany and Vermont R. R. Co.*, 12 Abb. Pr. B. 171.

10. In an action to restrain the infringement of a trade-mark, one of the plaintiffs, when offered as a witness on their own behalf, as to the issue on the question of damages sustained by them by the infringement, refused to answer as to the materials with which his compound, which he sought to protect by the trade-mark, was prepared: *Held*, that his claim for damages was properly stricken out as a penalty for contempt in refusing to answer, he not offering other testimony in support of it. *Burnett v. Phalon*, 11 Abb. Pr. 157.

11. An attachment to commit a party for contempt is not necessarily a nullity, because the order to show cause was not personally served on the defendant, and he had no notice of it prior to the adjudication on the question of contempt. *Pitt v. Davison*, 12 Abb. Pr. 385.

12. The defendants will not be punished for contempt for disobeying an injunction order in supplementary proceedings founded on affidavit, which does not truly describe the judgment. *Kennedy v. Weed and Wife*, 10 Abb. Pr. R. 62.

13. A party is not justified in disobeying an order, because it is merely erroneous. *The Arctic Fire Ins. Co. v. Hicks*, 7 Abb. Pr. 204.

14. Where an order is made directing a party to deliver property to a receiver, an attachment for contempt will not issue, because he refuses to do so on demand made by the plaintiff, his attorney, or the referee appointed to see that the delivery is made. *Panton v. Zebley*, 19 How. Pr. 394.

§ 481. *A contempt committed in the presence of the Court may be punished summarily; when not so committed, an affidavit or statement shall be made.*

When a contempt is committed in the immediate view and presence of the Court, or Judge at chambers, it may be punished summarily; for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Court, or Judge at chambers, an affidavit shall be presented to the Court, or Judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

1. An order of Court adjudging a party guilty of contempt, should always show upon its face the facts upon which the exercise of the power is based, and the adjudication is made. *The People v. Turner*, 1 Cal. 152.

2. Whenever an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt consisted, it will be reversed on *certiorari*. *Ex parte Field*; *Id.* 187.

3. Every Court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence in its presence; and in such case, may apprehend and punish an offender without further examination or proof; but where the offense is committed out of Court, the party is entitled to a notice and a hearing in his defense. *Id.*

4. An attachment will not be issued against a District Judge for noncompliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attachment is founded that any application has been made to the Court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the Judge in *vacation* is concerned, he has in substance complied with the command of the writ of *mandamus*; and in such case, it will not be deemed a disobedience of

the writ, that the Court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ. *Id.* 188.

5. The District Courts have jurisdiction to punish for contempts of their process, and to such writs as are necessary to the exercise of that jurisdiction. *Ex parte Cohen et. al.*, 5 Cal. 494.

6. A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject matter before the Court, there is no longer a case in which the questions can be asked. *Ex parte Rowe*, 7 Cal. 175.

7. It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon. *Id.*

8. A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the Grand Jury, is not a compliance with the section. The questions asked should be set out. *Id.* 181.

§ 482. *A warrant of attachment may issue, or a notice to show cause.*

When the contempt is not committed in the immediate view and presence of the Court or Judge, a warrant of attachment may be issued to bring the person charged to answer; or without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

§ 483. *Bail may be given by a person arrested under such warrant.*

[1859.] Whenever a warrant of attachment is issued pursuant to this chapter, the Court or Judge shall direct by an endorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such endorsement.

§ 484. *Sheriff shall, upon executing the warrant, arrest and detain the person until discharged.*

Upon executing the warrant of attachment, the Sheriff shall keep the person in custody, bring him before the Court or Judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

§ 485. *Bail bond, form and conditions of.*

When a direction to let the person arrested to bail is contained in the warrant of attachment, or endorsed thereon, he shall be dis-

charged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the Court or Judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

§ 486. *Officer shall return warrant and bail bond, if any.*

The officer shall return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

§ 487. *Hearing.*

When the person arrested has been brought up or appeared, the Court or Judge shall proceed to investigate the charge, and shall hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

§ 488. *Judgment and penalty if guilty.*

Upon the answer and evidence taken, the Court or Judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars; or he may be imprisoned not exceeding five days, or both.

§ 489. *If the contempt is the omission to perform any act, the person may be imprisoned until performance.*

When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act shall be specified in the warrant of commitment.

§ 490: *Persons in contempt may also be indicted, if an indictable offense.*

Persons proceeded against according to the provisions of this chapter shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the Court before which a con-



viction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted.

§ 491. *If a party fail to appear, proceedings.*

When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the Court or Judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

§ 492. *Illness sufficient excuse for nonappearance of party arrested. Confinement under arrests for contempt.*

Whenever, by the provisions of this chapter, an officer is required to keep a person, arrested on a warrant of attachment, in custody, and to bring him before a Court or Judge, the inability, from illness or otherwise, of the person to attend shall be a sufficient excuse for not bringing him up; and the officer shall not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

§ 493. *Judgments and orders in such cases final. Extent of punishment.*

The judgment and orders of the Court or Judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or imprisonment; but no fine shall exceed the sum of five hundred dollars, and no imprisonment shall exceed the period of five days, except as provided in section four hundred and eighty-nine.

1. The judgments and orders of Courts or Judges on the subject of contempts, are by our statutes declared to be final and conclusive. Under the writ of *habeas corpus*, this Court cannot review the orders of another Court in such cases. *Ex parte Cohen et al.*, 5 Cal. 494.

2. The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the Appellate Court will compel the Court below to issue an attachment to punish a contempt. *Merced Min. Co. v. Fremont*, 7 Cal. 130.

3. Per BURNETT, J. Every Court empowered to punish for contempt, is not the sole and final Judge in all cases of alleged contempt. *Ex parte Rowe*, 7 Cal. 175.

## TITLE XIV.

## OF COSTS.

SEC. 494. *Compensation of attorneys. Prevailing party shall be allowed costs.*

495. *Plaintiff's costs shall be allowed, of course, upon judgment in his favor, in certain cases.*

496. *Several actions, brought on a single cause of action, shall carry costs in but one.*

497. *Defendant's costs shall be allowed, of course, in certain cases.*

498. *Costs in actions not mentioned in section four hundred and ninety-five. Costs not allowed when recovery is less than two hundred dollars.*

499. *When the several defendants are not united in interest, costs may be reversed.*

500. *Costs discretionary with the Court in certain cases.*

501. *Repealed.*

502. *Repealed.*

503. *Repealed.*

504. *Referee's fees.*

505. *Continuance; costs may be imposed as a condition of.*

506. *Costs when a tender is made before suit is brought.*

507. *Costs in actions by, or against an administrator, etc.*

508. *Costs in a review, other than by appeal.*

509. *Costs paid on the commencement of an action.*

510. *Filing of an affidavit to bills of costs.*

511. *Interest and costs shall be included by the Clerk in the judgment.*

512. *Where plaintiff is a nonresident, or foreign corporation, defendant may require security for costs.*

513. *Justification of sureties on undertaking for costs.*

514. *If such security be not given, the action may be dismissed.*

§ 494. *Compensation of attorneys. Prevailing party shall be allowed costs.*

[1853, 1855.] The measure and mode of compensation of

attorneys and counselors shall be left to the agreement, express or implied, of the parties. But there shall be allowed to the prevailing party in any action in the Supreme Court, District Courts and County Courts, his costs and necessary disbursements in the action, or special proceeding in the nature of an action.

N. Y. Code, § 303.

1. **Generally.**—An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 331.

2. It being for the interest of all parties concerned, that the Company should be legally dissolved: *Held*, that the costs and a counsel fee, on each side, should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 55.

3. A mortgage contained a stipulation for all the costs of foreclosure, including counsel fees not exceeding five per cent. of the amount due: *Held*, that the limitation of five per cent. is intended to apply to counsel fees alone, and that the complainant would be entitled to recover the whole of his costs by operation of the statute, and independent of any stipulation. *Gronfier v. Minturn et al.*, 5 Cal. 492.

4. Where costs are imposed as a condition for reopening a case after the adjournment of the term, the acceptance of the costs of the opposite party will not be construed into a consent to have the cause reinstated. *Carpenter v. Hart*, 5 Cal. 406.

5. Costs by way of indemnity ought not to be taxed. *Rice v. Leonard et al.*, 5 Cal. 61.

6. Whether a Sheriff, under the Fee Bill of 1855 (Stat. 1855, § 85) providing that "he shall also be allowed such further compensation for his trouble and expense in taking possession of property under attachment or execution, or other process, and of preserving the same, as the Court from which the writ or order may issue shall certify to be just and reasonable," is entitled to the expenses of pasturing, herding and keeping cattle attached, without obtaining a *certificate* from the Court that such expenses are reasonable, not decided in this case, because it was held that such certificate was virtually given by the Court in allowing the expenses, as taxed in a bill of costs. *Smith v. Richmond*, 476.

7. A person claiming an interest in mortgaged premises subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 267.

8. A *mandamus* is not the proper remedy, when an inferior Court refuses to enter a judgment for costs. The party should appeal or sue for his costs. *Peralta v. Adams*, 2 Cal. 595.

9. A mistake in the computation of interest or taxation of costs cannot be attacked for the first time in an Appellate Court. The party complaining must move in a Court below to correct the computation, or retax the costs, and thus obtain the judgment of the Court of original jurisdiction upon the disputed items, before resort can be had to a higher tribunal. *Guy v. Franklin*, 5 Cal. 417.

10. The judgment of the Supreme Court on appeal, and costs consequent thereon, is final, and the District Court has no authority to prevent immediate execution of the judgment of this Court so remitted. *City of Marysville v. Buchanan*, 3 Cal. 23.

11. The Clerk of the Supreme Court, in entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the Clerk below to issue an execution. *Id.*

12. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The Clerk below can issue execution for these damages and costs. *McMillan v. Visher*, 14 Cal. 241.

13. The notices and affidavits filed on an application to retax costs were not embodied in a bill of exceptions or statement: *Held*, that the judgment must be affirmed, upon the presumption that the Court below decided properly upon all the evidence before it. *Gates v. Buckingham*, 4 Cal. 286.

14. **Allowance of costs in many cases discretionary.**—The allowance of costs rests in the discretion of the Court of original jurisdiction. And where on sustaining a demurrer to a complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, the Court gave judgment for the defendant for full costs, *including a jury fee*: *Held*, no such abuse of discretion as to warrant interference by the Supreme Court. *Harvey v. Chilton*, 11 Cal. 120.

15. The Supreme Court will only review the ruling of an inferior Court in the matter of costs upon an appeal from the judgment in the case. *Todd v. Marshall*, 20 Cal.; *Votan v. Reese et al.*, *Id.*

16. **Nonsuit.**—Plaintiff subject to. See *ante*, § 148.

§ 495. ~~Plaintiff's costs~~ shall be allowed, of course, upon judg-

Sec. 495. Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases: First—In an action for the recovery of real property. Second—In an action to recover the possession of personal property, when the value of the property amounts to three hundred dollars or over; such value to be determined by the jury. Court or referee by whom the action is tried. Third—In an action for the recovery of money or damages where plaintiff recovers three hundred dollars or over. Fourth—In a special proceeding in the nature of an action in which the value of the property is

of course, to the plaintiff upon a judgment in cases:

1st—In an action for the recovery of real property; 2d—In an action for the recovery of money or damages where plaintiff recovers three hundred dollars or over; 3d—In an action for the recovery of money or damages where plaintiff recovers two hundred dollars or over. Such value shall be determined by the jury, Court or referee, by whom the action is tried;

3d. In an action for the recovery of money or damages, where plaintiff recovers two hundred dollars or over.

4th. In a special proceeding in the nature of an action.\*

See § 255. N. Y. Code, § 304.

1. **First subdivision.**—In an action to try the right to the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Marius v. Bicknell*, 10 Cal. 217.

2. **Second subdivision.**—A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is nevertheless entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

3. **Third subdivision.**—The plaintiff can only be allowed costs when he recovers two hundred dollars in an action for money or damages. Costs are incident to the judgment, and cannot be given by the jury by way of damages. *Shay v. Tuol. Water Co.*, 6 Cal. 286.

4. Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the Supreme Court, where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum. *Dumphy v. Guindon*, 13 Cal. 30, overruling *Gordon v. Ross*, 2 Cal. 157.

\* STATUTES OF 1858, PAGE 232, § 7—Applicable to the City and County of San Francisco only.

SECTION 7.—The prevailing party shall be allowed five per cent. on the amount recovered, together with any sum by him so paid in a cause as costs and disbursements, to be included in the judgment against the adverse party; *provided*, said five per cent. shall be allowed only in litigated cases; and *provided, further*, that said per centage shall not be allowed to exceed the sum of one hundred dollars on any one judgment.

§ 496. *Several actions brought on a single cause of action shall carry costs in but one.*

When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this State; but the disbursements of the plaintiff shall be allowed to him in each section [action].

N. Y. Code, § 304.

1. Where an action has been commenced against several defendants, and there has been a judgment in their favor, they are not all entitled to recover separate costs to the amount allowed by the act, but can only recover jointly, as though there had been but one defendant. *Rice v. Leonard et al.*, 5 Cal. 61.

2. Possibly as the entry of such several judgments in ejectment increases the costs, it would be ground for retaxing or apportioning them. *Lick v. Stockdale*, 18 Cal. 219.

See *post*, § 495.

§ 497. *Defendant's costs shall be allowed, of course, in certain cases.*

Costs shall be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section four hundred and ninety-five, and in a special proceeding in the nature of an action.

N. Y. Code, § 305.

§ 498. *Costs in actions not mentioned in section four hundred and ninety-five; costs not allowed, in actions for less than three hundred dollars.*

Sec. 498. In other actions than those mentioned in Section 495, costs may be allowed, or not; and if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the Court; no costs shall be allowed in action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

In other actions than those mentioned in section four hundred and ninety-five, costs may be allowed, or not; and if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the Court; but no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than two hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than two hundred dollars.

N. Y. Code, § 306.

1. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 101.

2. In this case—suit for damages to a mining claim and for injunction—plaintiffs had judgment for one hundred dollars and costs, taxed at \$———, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. Motion denied, except as to the costs accrued by reason of the injunction granted: *Held*, that this is a case where the allowance of costs is in the discretion of the Court below. *Esmond v. Chew*, 17 Cal. 336.

3. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the prior attachments become liens, in the nature of legal estate vested in the Sheriff for the benefit of the creditors; plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Patrick v. Montader*, 13 Cal. 444.

§ 499. *When the several defendants are not united in interest, costs may be severed.*

When there are several defendants in the actions mentioned in section four hundred and ninety-five not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the Court shall award costs to such of the defendants as have judgment in their favor.

N. Y. Code, § 306.

1. Where two persons are made defendants, and sued as joint makers of a promissory note, and they answer separately, and one of them pleads infancy as a defense, they thenceforth cease to be "united in interest," within the meaning of those words as used in section three hundred and six of the Code. (*Slocum v. Hooker*, 13 Barb. 536.) So far from being united in interest, the fact that they severed in their defense, and one rested on his personal exemption, rendered their interests diverse and antagonistic. *Buller v. Morris*, 1 Bosw. 329.

2. In such case, the Judge may on the trial, in his discretion, allow the plaintiff to discontinue, without costs, against the defendant establishing such a personal defense. *Id.*

§ 500. *Costs discretionary with the Court in certain cases.*

In the following cases the costs of an appeal shall be in the discretion of the Court:

1st. When a new trial is ordered;

2d. When a judgment is modified.

N. Y. Code, § 306.

1. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the Court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 51.

2. The costs on appeal, or properly the costs in this Court, and the cost of making up the appeal in the Court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit. *Gray v. Gray and Eaton v. Palmer*, 11 Cal. 341.

3. Where the judgment below is reversed on appeal and a new trial had, the costs of the first trial are part of the final bill of costs. *Visher v. Webster*, 13 Cal. 58.

4. The judgment in this case being for too much interest, was modified by the Supreme Court in that particular, and then permitted to stand, at appellant's costs,

on the principle that where the Supreme Court modifies the judgment below for an apparent error, which appellant might have had corrected below, on motion, respondent will not be taxed with costs. *Cossin v. Marshall*, 18 Cal. 689.

5. Appellant made to pay costs, although the judgment is reversed. *Reniff v. Cynthia*, 18 Cal. 669.

6. Judgment may be affirmed as to a *mandamus*, but reversed as to costs. *McDougall v. Roman*, 2 Cal. 80.

7. Where in ejectment the facts found by the Court authorized a judgment for possession, but not for damages, the judgment being for possession and damages was affirmed in the Supreme Court, upon respondent's remitting the damages and paying the costs of appeal. *Doll v. Feller*, 16 Cal. 433.

8. Case where each party was made to pay his own costs on appeal. *Bradbury v. Barnes*, 19 Cal. 120.

9. Case where costs of motion in Supreme Court were not allowed. *Swain v. Naglee*, 19 Cal. 127.

10. Case where appellant paid costs in Supreme Court. *Jungerman v. Bovee*, 19 Cal. 354.

11. Where a judgment of the Court was incorrect in part, the Appellate Court ordered the Court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welch v. Sullivan*, 8 Cal. 512.

12. If no motion be made in the Court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost. *Tryson v. Sutton*, 13 Cal. 491.

13. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for rehearing. *Gray v. Gray*, 11 Cal. 341.

14. Defendants below and appellants here, on the main question, to wit: the injunction, required to pay costs in this Court on both appeals. *Jungerman v. Bovee*, 19 Cal. 355.

15. Where a case is remanded for further proceedings, and costs awarded in this Court in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Gray v. Gray*, 11 Cal. 341.

16. See *post*, § 665, as to execution for costs on filing the *remittitur*.

§ 501. [1853, 1855.] *Repealed.*

§ 502. [1853, 1855.] *Repealed.*

§ 503. [1853, 1855.] *Repealed.*

§ 504. *Referees' fees.*

The fees of referees shall be five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

§ 505. *Continuance, costs may be imposed as condition of.*

[1855.] When an application is made to a Court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the Court or referee, as a condition of granting the same.

§ 506. *Costs when a tender is made before suit brought.*

When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in Court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant.

1. Evidence of waiver of tender by opposite party is competent, and sufficient to support the averment of tender. *Holmes v. Holmes*, 5 Seld. 525.

2. The answer must aver a readiness still to pay the tender; it is an essential part of the plea. *Kortright v. Cadg*, 23 Barb. 490; 5 Abbott, 358.

3. It is very doubtful if a tender can now be made after suit brought, unless in the form of section three hundred and ninety, an offer to take judgment. *Thurston v. Marsh*, 14 How. Pr. 572.

§ 507. *Costs in action by or against an administrator, etc.*

In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs shall, by the judgment, be made chargeable only upon the estate, fund or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

N. Y. Code, § 317.

1. Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been prosecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. 169.

2. The provisions of 2 Revised Stat. (N. Y.) 90, § 41, exempting executors and administrators from costs, contemplates actions commenced against such parties, and do not apply to an action commenced against the decedent, in his lifetime, and continued by an order of the Court, under section one hundred and twenty-one of the Code, against the representatives. In such case, under section three hundred and seventeen of the Code, the adverse party may, on prevailing, recover costs of the action from the representatives. *Lemen v. Wood*, 16 How. Pr. R. 285.

3. The fact that the claim was prosecuted with unreasonable haste, justifies the executor in resisting it. *Buckhout v. Hunt*, 16 How. Pr. R. 407.

4. Where it appears that the M. and F. Bank, although plaintiffs in one of the judgments upon which supplementary proceedings were instituted, which resulted in the appointment of the plaintiff as receiver, were never in fact concerned in such supplementary proceedings, nor instrumental in obtaining the appointment of the receiver, nor in any way connected with, or authorizing or directing the commencing or prosecution of a suit brought by him: *Held*, that the bank could not be charged with the costs of the action. 1. The bank was not the real party in interest in such action, although if anything had been collected it must have inured to their benefit. 2. They were not the party represented by the receiver, within the meaning of section three hundred and seventeen of the Code. It is only as against the debtor that the receiver or an assignee is entitled to represent the creditors; and the creditors are not liable for costs of his action, without some special authority or interference on their part in respect to his bringing the action. *McHarg v. Donnelly*, 27 Barb. 100.



5. To entitle the plaintiff to charge the executor or administrator with the costs of an action, he must establish to the satisfaction of the Court: first, that the demand was unreasonably neglected; or second, that it was unreasonably resisted; or third, that the defendant refused to refer the matter in controversy to three disinterested persons (pursuant to the provisions of 2 Rev. Stat. 30, § 36). It is a complete answer to any suggestion of unreasonable neglect to say that the demand was exhibited to the executor thirty-four days from the time of issuing the letters, and was prosecuted fifteen days after its presentation. *Buckhout v. Hunt*, 16 How. Pr. R. 407.

6. If on the trial the executor materially reduced its amount, his resistance of the claim is not to be deemed unreasonable. (*Roberts v. Ditmars*, 7 Wend. 522; *Carhart v. Blaisdell*, 18 Id. 531; *Comstock v. Olmstead*, 6 How. Pr. R. 79; *Bullock v. Bogardus*, 1 Den. 276); *Buckhout v. Hunt*, 16 How. Pr. R. 407.

### § 508. *Costs in a review other than by appeal.*

When the decision of a Court of inferior jurisdiction in a special proceeding is brought before a Court of higher jurisdiction for a review in any other way than by appeal, the same costs shall be allowed as in cases on appeal, and may be collected by execution, or in such manner as the Court may direct, according to the nature of the case.

### § 509. *Costs paid on the commencement of an action.*

[1862.] *On the commencement of an action, the plaintiff, and on the filing of notice of appeal from a final judgment, the appellant, shall pay to the Clerk three dollars, to be applied to the payment of the salary of the Judge of the Court in which the payment is made. Each Clerk shall keep a true and accurate account of all moneys so received, and shall pay over the same at the end of each month to the Judge of such Court, taking duplicate receipts for each payment, one of which shall be filed by the said Clerk in his office. On the first day of each month, the said Clerk shall deliver to the Treasurer of the county an account of all sums received, specifying the cases in which received, and of all sums paid out. At the same time, a like account shall be made out and forwarded by such Clerk to the Controller of State of the sums paid in to the respective Courts, and of the sums paid out, with the other receipts of said Judge therefor. It shall be the duty of the District Attorney, at the commencement of each month, to examine the books of said Clerk, and if found correct, he shall make and execute a certificate to such Controller to that effect. In paying the salary of any of the said Judges, the Controller shall deduct the amount paid to such Judge, as shown by the receipt of such Judge.*

§ 510. *Filing of, and affidavit to, bill of costs.*

[1855.] The party in whose favor judgment is rendered, and

judgment.

N. Y. Code, § 310.

1. After a judgment is entered, and the record completed, the Clerk has no power to fill up the blank left for costs. His authority terminates with the entry of the judgment, and the Court alone, on motion to amend, is competent to relieve where costs are omitted. *Chapin v. Broder*, 16 Cal. 403.

§ 512. *Where plaintiff is a nonresident, or foreign corporation, defendant may require security for costs.*

When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until an undertaking, executed by two or more persons, be filed with the Clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the Court or Judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

N. Y. Code, § 303.

1. Where defendant, December 19th, under sections five hundred and twelve and five hundred and fourteen of the Practice Act, served on plaintiff, a nonresident, notice to give security for costs, the notice not being accompanied with an order staying proceedings, and on the next day judgment was rendered for defendant, and plaintiff appealed to the Supreme Court: *Held*, on motion to dismiss the appeal, that, after judgment, it was too late to move to dismiss the action; that the undertaking on appeal is sufficient security for costs subsequently incurred, and that the motion must be denied. *Comstock v. Clemens*, 77.

2. The defendant has the right to security for costs only, where all the plaintiffs are nonresidents. *Ten Broeck v. Reynolds*, 13 How. Pr. 462.

3. A foreign Government suing in a Court of the State, may be required to file security for costs. *Republic of Mexico v. Arrangois*, 3 Abbott, 470.

4. Where plaintiffs have once put in security for costs required by statute, they cannot be ordered to file new security, although the security on the original undertaking became insolvent. *Hartford Quarry Co. v. Pendleton*, 4 Abbott, 460.

5. A plaintiff who is a nonresident at the time of commencing his action, is not excused from filing security for costs by the fact that he afterwards became a resident. *Ambler v. Ambler*, 8 Id. 340.

§ 513. *Justification of sureties on undertaking for costs.*

Each of the sureties on the undertaking mentioned in the last section, shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

§ 514. *If such security be not given, the action may be dismissed.*

After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the Court or Judge may order the action to be dismissed.

## TITLE XV.

## OF MOTIONS, ORDERS, NOTICES, SERVICE OF PAPERS, AND MISCELLANEOUS PROVISIONS.

SEC. 515. *Order and motion, defined.*

516. *Motions, where to be made.*

517. *Notice of motion, at what time to be given.*

518. *Transfer of motions, and orders to show cause.*

519. *Provisions of this title not applicable to original or final process.*

520. *Service of notice of motion, when personal or otherwise.*

521. *Service may be made by mail when the persons reside in different places.*

522. *Manner of service by mail.*

523. *Appearance. Notices after appearance.*

524. *Service on nonresidents. Where a party has an attorney, service shall be on such attorney.*

525. *Successive actions on the same contract, etc.*

526. *Consolidation of several actions into one.*

527. *Adverse claims, actions may be brought to determine.*

528. *The Clerk shall keep a register of actions.*

529. *Two of three referees, etc., may do any act.*

530. *Computation of time in this Act. The time within which any act is to be done may be extended.*

531. *Papers without title of the action, or with defective title, may be valid.*

532. *Limitation of actions which have arisen in another State.*

§ 515. *Order and motion, defined.*

Every direction of a Court or Judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

N. Y. Code, § 400.

1. When the statute speaks of notice of a motion, it means written notice, or notice in open Court, of which a minute is made by the Clerk. *Borland v. Thornton*, 12 Cal. 440.

2. Against a motion there seems to be no statute of limitations, and it may be made when there is no unreasonable delay. *Reynolds v. Parrez*, 14 Cal. 668.

3. Where a party in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the Court may afford any relief compatible with the facts of the case presented. *The People v. Turner*, 1 Cal. 152.

4. A second application for an order refused, or granted conditionally, except the application be made in a higher Court, may be punished as a contempt. This does not apply to cases where the application is refused for informality of papers. See Appendix "Act concerning Courts," §§ 105, 106.

### § 516. *Motions, where to be made.*

Motions shall be made in the county in which the action is brought, or in an adjoining county in the same district.

N. Y. Code, § 401. See Appendix "Acts concerning Courts," § 25.

### § 517. *Notice of motion, at what time to be given.*

[1853.] When a written notice of a motion is necessary, it shall be given, if the Court be held in the same district with both parties, five days before the time appointed for the hearing; otherwise ten days, but the Court, or Judge, or County Judge, may prescribe a shorter time.

N. Y. Code, § 402.

1. The Court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law for filing papers in a cause. *Wood v. Fobes*, 5 Id. 62.

### § 518. *Transfer of motions, and orders to show cause.*

When a notice of motion is given, or an order to show cause is made returnable before a Judge out of Court, and at the time fixed for the motion, or on the return day of the order, the Judge is unable to hear the parties, the matter may be transferred by his order to some other Judge, before whom it might originally have been brought.

N. Y. Code, § 404.

### § 519. *Provisions of this title not applicable to original or final process.*

Written notices and other papers, when required to be served on the party or attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt.

J. P.

§ 520. *Service of notice of motion, when personal or otherwise.*

The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

1st. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his Clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence not be known, then by putting the same enclosed in an envelope, into the post-office, directed to such attorney;

2d. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope, into the post-office, directed to such party.

J. P.; N. Y. Code, § 409.

§ 521. *Service may be made by mail when persons reside in different places.*

Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

N. Y. Code, § 410.

1. When the paper is deposited in the proper post-office, correctly addressed, and postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail. *Jacobs v. Hooker*, 1 Barb. 71.

§ 522. *Manner of service by mail.*

[1861.] In case of service by mail, the notice, or other paper, shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service shall be increased one day for every twenty-five miles distance between the place of deposit and the place of address; provided, that service in any case shall be deemed complete at the end of ninety days from the date of its deposit in the post-office.

§ 523. *Appearance. Notices after appearance.*

A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings, of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.

J. P.; N. Y. Code, § 414.

1. Where the record shows, in general terms, the appearance of parties, the appearance will be confined to these parties served with process. *Chester v. Miller*, 13 Cal. 558.

2. The object of a summons is to bring the party into Court. If that object be obtained by the appearance and pleading of the party, he cannot complain. *Smith v. Curtis*, 7 Cal. 584.

3. When a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. *Deidesheimer v. Brown*, 8 Cal. 339.

4. Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id.*

5. Where the Court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the Court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 60.

6. When a motion is made to dismiss, upon an irregular appearance, and is overruled, and defendant answers, it is not to be considered as such an appearance as waives the irregularity. *Deidesheimer v. Brown*, 8 Cal. 339.

§ 524. *Service on nonresidents. Where a party has an attorney, service shall be on such attorney.*

When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the Clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

N. Y. Code, § 415.

§ 525. *Successive actions on the same contract, etc.*

Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

J. P.

§ 526. *Consolidation of several actions into one.*

Whenever two or more actions are pending at one time between the same parties, and in the same Court, upon causes of action which might have been joined, the Court may order the actions to be consolidated into one.

J. P.; N. Y. Code, § 212.

*J.P. See Sect 635-*

§ 527. *Adverse claims, action may be brought to determine.*

An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

J. P.; Willard's Eq. Jur. 106-124.

1. Sustained. *King v. Hall*, 5 Cal. 82.

§ 528. *The Clerk shall keep a register of actions.*

The Clerk shall keep among the records of the Court, a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein.

§ 529. *Two of three referees, etc., may do any act.*

When there are three referees, or three arbitrators, all shall meet, but two of them may do any act, which might be done by all.

§ 530. *Computation of time in this act. The time within which an act is to be done may be extended.*

[1861.] The time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day, and including the last; if the last day be Sunday, it shall be excluded. When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, or the preparation of statements, or of bills of exceptions, or of amendments thereto, the time allowed by this Act may be extended, upon good cause shown, by the Court in which the action is pending, or the Judge thereof, or



in the absence of such Judge from the county in which the action is pending, by the County Judge; but such extension shall not exceed thirty days beyond the time prescribed by this Act, without the consent of the adverse party.

N. Y. Code, § 407.

1. When time is important, Courts will inquire into a day, or fractional portion of a day. *People v. Beatty*, 14 Cal. 566.

§ 531. *Papers without the title of the action, or with defective title, may be valid.*

An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose, as if duly entitled, if it intelligibly refer to such action or proceeding.

J. P.; N. Y. Code, § 406.

1. A slight error in the title of a cause, where there is no other suit pending between the parties, will not invalidate the notice. *Mills v. Dunlap*, 3 Cal. 94.

§ 532. *Limitation of actions which have arisen in another State.*

When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

J. P.

1. Where a judgment by confession was entered in Pennsylvania, which was afterward opened, and a trial had, which resulted in judgment for plaintiff: *Held*, that our Statute of Limitations did not commence running until the final entry, although, by the laws of Pennsylvania, the lien of the first judgment was not destroyed. *Parke v. Williams*, 7 Cal. 247.

2. The Statute of Limitations of this State only commences running against a judgment from the time of the final entry thereof. *Id.*

## TITLE XVI.

### OF PROCEEDINGS IN CIVIL CASES IN JUSTICES' COURTS.

#### CHAPTER I.—*Of the parties, and the time and place of commencing actions in Justices' Courts.*

SEC. 533. *Certain of the foregoing provisions shall be applicable to Justices' Courts.*

534. *Parties may appear in person or by attorney.*

535. *Venue of actions in Justices' Courts.*

536. *Judgment by confession, venue of.*

537. *Actions in which parties voluntarily appear, venue of.*

§ 533. *Certain of the foregoing provisions shall be applicable to Justices' Courts.*

[1860.] The provisions of title one of this Act, as to parties to actions, shall be applicable to actions of which a Justice's Court has jurisdiction; also, the provisions of this Act from section three hundred and seventeen to section three hundred and thirty-two, both sections inclusive, are hereby made applicable to Justices' Courts, the word "Justice" being substituted for the word "Clerk," and the word "Constable" for the word "Sheriff."

§ 534. *Parties may appear in person or by attorney.*

Parties in Justices' Courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the Constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party.

§ 535. *Venue of actions in Justices' Courts.*

[1853.] No person shall be held to answer to any summons issued against him from a Justice's Court, in a civil action, in any township or city other than the one in which he shall reside, except in the cases following:

1st. When there shall be no Justice's Court for the township or city in which the defendant may reside, or no Justice competent to act on the case;

2d. When two or more persons shall be jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a Justice's Court of the township or city in which any of the debtors or other persons liable may reside ;

3d. In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed ;

4th. When personal property unjustly taken or detained is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken ;

5th. When the defendant is a nonresident of the county, he may be sued in any township or city wherein he may be found ;

6th. Where a person has contracted to perform any obligation at a particular place, and resides in another township or city, he may be sued in the township or city in which such obligation is to be performed, or in which he resides ;

7th. When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated ;

8th. Any person or persons residing in the City of San Francisco, may be held to answer to any summons issued against him or them from the Court of a Justice for any township within the corporate limits of the City of San Francisco, in any action or proceeding whereof Justices of the Peace of the City or County of San Francisco have or may have jurisdiction by law ; provided, nothing herein shall be construed to allow any Justice of said city or county to hold a Court in any other township than the one for which he shall have been elected.

1. Where the record shows that suit was brought in township No. 4, Sierra County, that the summons was served, by the Constable of that township, in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute. (Wood's Dig. 232, 233.) The judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder. *Lowe v. Alexander*, 15 Cal. 296.

#### § 536. *Judgment by confession, venue of.*

Judgment upon confession may be entered up in any Justice's Court in the State, specified in the confession.

1. Judgment, by consent or confession, for over two hundred dollars, in a Justice's Court, is void. Consent of parties cannot give jurisdiction which the Constitution denies. *Feillett v. Eagles*, 8 Cal. 76.

§ 537. Justices' Courts shall have jurisdiction of actions, and of the persons of the parties thereto, upon the voluntary appearance of the parties without summons, and without regard to their residence or the place where the cause of action arose or the subject-matter of the action may exist. The plaintiff may commence an action by summons, either in the town or city where the contract was, by its terms, to be performed, or in which the defendant resides, as he elects.

Section 9 of an Act entitled "An Act to regulate appeals from this State," approved May 26, 1861, is hereby amended as to all proceedings which may be had after this act takes effect.

*voluntarily appear, venue of.*

jurisdiction of an action upon the parties without summons, without place where the cause of action action may exist.

## CHAPTER II.—*Summons, arrest, attachment and claim of personal property.*

SEC. 538. *Commencement of actions in Justices' Courts.*

539. *Appointment of guardians.*

540. *Summons, formal and substantial facts of.*

541. *Time within which summons shall be returned.*

542. *Service of summons.*

543. *Service by publication.*

544. *Order of arrest, and arrest of defendant.*

545. *Affidavit and undertaking for order of arrest.*

546. *A defendant arrested shall be taken before the Justice immediately.*

547. *The officer shall give notice to plaintiff of the arrest.*

548. *The officer shall detain defendant until duly discharged.*

549. *Defendant may demand trial immediately.*

550. *Adjournment on motion of a defendant shall be granted on filing undertaking.*

551. *Attachment against the property of defendant may be made in certain cases.*

552. *Writ of attachment shall issue upon affidavit.*

553. *Undertaking on attachment shall be required.*

554. *Writ of attachment, substance of. The officer may take an undertaking instead of levying.*

555. *Certain preceding provisions shall apply to attachments in Justices' Courts.*

556. *Plaintiff may replevy personal property.*

- 557. *Affidavit in replevin.*
- 558. *The Justice shall order the officer to replevy the property upon receiving an undertaking.*
- 559. *Undertaking in replevin. The officer shall serve the affidavit, order and undertaking on defendant.*
- 560. *Defendant may except to the sureties. The officer shall be responsible until the sureties justify.*
- 561. *Defendant may, within two days, require a return of the property.*
- 562. *Defendant's sureties shall justify. Officer to be responsible until such justification.*
- 563. *If the property be concealed, duty of the officer.*
- 564. *The officer shall deliver the property to the party entitled thereto.*
- 565. *Claim of the property by a third party, proceedings upon.*
- 566. *The officer shall return order and affidavit within five days.*
- 567. *Qualification of sureties in this chapter.*
- 568. *Manner of justification of sureties.*
- 569. *Examination to be annexed to the undertaking.*

§ 538. *Commencement of actions in Justices' Courts.*

Actions in Justices' Courts shall be commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, or a concise statement in writing of the cause of action, and the issuance of a summons thereon, or by the voluntary appearance and pleadings of the parties without summons. In the latter case, the action shall be deemed commenced at the time of appearance.

§ 539. *Appointment of guardians.*

When a guardian is necessary, he shall be appointed by the Justice, as follows:

1st. If the infant be plaintiff, the appointment shall be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in

writing of the guardian to be appointed, and to be responsible for costs, if he fail in the action, shall be first filed with the Justice ;

• 2d. If the infant be defendant, the guardian shall be appointed at the time the summons is returned, or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writing to be appointed. Otherwise, the Justice may appoint any suitable person who gives such consent.

§ 540. *Summons, formal and substantial facts of.*

The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name ; and shall summon him to appear before the Justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described, in general terms, sufficient to apprise the defendant of the nature of the claim against him ; and in an action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the Justice before whom it is returnable.

§ 541. *Time within which summons shall be returned.*

[1854.] The time mentioned in the summons for the appearance of the defendant and the time of service shall be as follows :

1st. When the summons is accompanied with an order to arrest the defendant, it shall be returnable immediately ;

2d. When the defendant is not a resident of the township or city, or when the plaintiff is not a resident, it shall be returnable not more than two days from its date, and shall be served at least one day before the time for appearance ;

3d. In all other cases, it shall be returnable in not less than two, or more than ten days from its date, and shall be served at least two days before the time for appearance.

1. A Justice of the Peace cannot make a summons returnable in eleven days after service. *Deidesheimer v. Brown*, 8 Cal. 339.

§ 542. *Service of summons.*

The summons shall be served by the Sheriff, or a Constable of the county, as follows :

1st. If the action be against a corporation, by a delivery of a copy to the President or other head of the corporation, or to the Secretary, Cashier or Managing Agent thereof; or, when no such officer resides in the county, to a Director resident therein;

2d. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father, mother, or guardian; or, if there be none within the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is;

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, by delivery of a copy to such guardian;

4th. In all other cases, by delivery of a copy to the defendant personally.

See § 604.

1. A summons issued from a Justice of the Peace at the suit of plaintiff against Adams & Co., which was returned served by "leaving a copy thereof with Captain Charles D. Macy:" *Held*, that a judgment by default would not bind Adams & Co., and there is nothing in the record to connect Macy with them. *Adams v. Town*, 3 Cal. 248.

2. Constables may appoint deputies. *Taylor v. Brown*, 4 Cal. 188.

#### § 543. *Service by publication.*

[1854.] When the person upon whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the Justice, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made, the Justice shall grant an order that service be made by the publication of the summons. The order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least one week: provided, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the Justice shall also direct a copy of the summons to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence.

See *ante*, §§ 30, 31.

§ 544. *Order of arrest, and arrest of defendant.*

An order to arrest the defendant may be endorsed on a summons issued by the Justice, and the defendant may be arrested thereon by the Sheriff or Constable, at the time of serving the summons, and brought before the Justice, and there detained until duly discharged, in the following cases, arising after the passage of this Act:

1st. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors; or where the action is for a willful\* injury to the person, or for taking, detaining or injuring personal property;

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity;

3d. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought;

4th. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action.

§ 545. *Affidavit and undertaking for order of arrest.*

Before an order for an arrest shall be made, the party applying shall prove to the satisfaction of the Justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the Justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

§ 546. *A defendant arrested shall be taken before the Justice immediately.*

The defendant, immediately upon being arrested, shall be taken to the office of the Justice who made the order, and if he be absent

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\* See *ante*, p. 130, No. 3.



or unable to try the action, or if it be made to appear to him by the affidavit of the defendant, that he is a material witness in the action, the officer shall immediately take the defendant before the 'next Justice of the city or township, who shall take cognizance of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

See § 582.

§ 547. *The officer shall give notice to the plaintiff of the arrest.*

The officer making an arrest shall immediately give notice thereof to the plaintiff, or his attorney or agent, and endorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

§ 548. *The officer shall detain the defendant until duly discharged.*

The officer making the arrest shall keep the defendant in custody until duly discharged by order of the Justice.

§ 549. *Defendant may demand trial immediately.*

The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and upon such demand being made, the trial shall not be delayed beyond three hours, except by the trial of another action pending at the time; or he may have an adjournment, and be discharged on giving bail, as provided in the next section. An adjournment at the request of the plaintiff, beyond three hours, shall discharge the defendant from arrest; but the action may proceed, notwithstanding, and the defendant shall be subject to arrest on the execution, in the same manner as if he had not been so discharged.

See § 582.

§ 550. *Adjournment on motion of defendant shall be granted on filing undertaking.*

If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the Justice an undertaking, with two or more sufficient sureties, to be approved by the Justice, to the effect that he will render himself amenable to the process of the Court during the pendency of the

action, and such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this section, the Justice shall order the defendant to be discharged from custody.

§ 551. *Attachment against property of defendant may be made in certain cases.*

[1858, 1860.] In an action upon a contract, express or implied, made after the passage of this Act, for the direct payment of money, which contract is made or is payable in this State, and is not secured by mortgage, lien or pledge upon real or personal property, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided.

§ 552. *Writ of attachment shall issue upon affidavit.*

[1858.] A writ to attach the property of the defendant shall be issued by the Justice, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section one hundred and twenty-one of this Act.

1. This section was not amended so as to authorize an attachment upon a contract made prior to the passage of this Act, or against nonresidents, as in section one hundred and twenty.

§ 553. *Undertaking on attachment shall be required.*

[1858, 1860.] Before issuing the writ, the Justice shall require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment.

1. If a Justice issue an attachment, and take bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. *Benedict v. Brag*, 2 Cal. 251.

§ 554. *Writ of attachment, substance of. Officer may take an undertaking instead of levying.*

The writ may be directed to the Sheriff or any Constable of the county, and shall require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

§ 555. *Certain preceding provisions shall apply to attachments in Justices' Courts.*

The sections of this act, from section one hundred and twenty-four to section one hundred and forty-one, both inclusive, shall be applicable to attachments issued in Justices' Courts; the word "Constable" being substituted for the word "Sheriff," whenever the writ is directed to a Constable, and the word "Justice" being substituted for the word "Judge."

§ 556. *Plaintiff may replevy personal property.*

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

See *ante*, § 200.

§ 557. *Affidavit in replevin.*

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed, (particularly describing it) or is lawfully entitled to the possession thereof;

2d. That the property is wrongfully detained by the defendant;

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4th. That the same has not been taken for a tax, assessment or fine, pursuant to statute, or seized under an execution, or an attach-

ment against the property of the plaintiff, or if seized, that it is by statute exempt from such seizure ; and

5th. The actual value of the property.

§ 558. *The Justice shall order to replevy the property upon receiving an undertaking.*

The Justice shall thereupon, by an indorsement in writing upon the affidavit, order the Sheriff or a Constable of the county to take the same from the defendant, and deliver it to the plaintiff, upon receiving the undertaking mentioned in the following section.

§ 559. *Undertaking in replevin. The officer shall serve the affidavit, order and undertaking on the defendant.*

Upon the receipt of the affidavit and order, with a written undertaking, executed by two or more sufficient sureties, approved by the officer, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the officer shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order and undertaking, by delivering the same to him personally, if he can be found within the county, or to his agent from whose possession the property is taken ; or if neither can be found within the county, by leaving them at the usual place of abode of either within the county, with some person of suitable age and discretion ; or if neither have any known place of abode within the county, by putting them in the nearest post-office, directed to the defendant.

§ 560. *Defendant may except to the sureties. The officer shall be responsible until the sureties justify.*

The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the officer that he excepts to the sufficiency of the sureties ; if he fails to do so, he shall be deemed to have waived all objection to them. When the

defendant excepts, the sureties shall justify on notice before the Justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

*§ 561. The defendant may within two days require a return of the property.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

*§ 562. Defendant's sureties shall justify. Officer to be responsible until such justification.*

The defendant's sureties, upon reasonable notice to the plaintiff, shall justify before the Justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place fail to justify at the time appointed, he shall deliver the property to the plaintiff.

*§ 563. If the property be concealed, duty of the officer.*

If the property or any part thereof be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession.

§ 564. *The officer shall deliver the property to the party entitled thereto.*

When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

§ 565. *Claim of the property by a third party, proceedings upon.*

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the officer, the officer shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer unless so made.

§ 566. *The officer shall return the order and affidavit within five days.*

The officer shall return the order and affidavit, with his proceedings thereon, to the Justice, within five days after taking the property mentioned therein.

§ 567. *Qualification of sureties in this chapter.*

The qualification of sureties on the several undertakings required by this chapter shall be as follows:

1st. Each of them shall be a resident and householder or freeholder within the county;

2d. Each shall be worth double the amount stated in the undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

§ 568. *Manner of justification of sureties.*

For the purpose of justification, each of the sureties shall attend before the Justice at the time mentioned in the notice, and may be examined on oath, on the part of the adverse party, touching his sufficiency, in such manner as the Justice, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the sureties, if required.

§ 569. *Examination to be annexed to the undertaking.*

If the Justice find the sureties sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and file the same, and the officer shall thereupon be exonerated from liability.

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CHAPTER III.—*Pleadings and trial.*

SEC. 570. *Pleadings in Justices' Courts.*

571. *Pleadings, in what cases to be in writing or oral.*

572. *Pleadings, manner of presenting and form of.*

573. *Complaint, contents of.*

574. *Answer, contents of.*

575. *Statement of insufficient knowledge, etc., shall be deemed a denial.*

576. *Manner of pleading a written instrument.*

577. *If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.*

578. *Demurrer to pleadings in Justices' Courts.*

579. *Variance between the proof and the allegations in a pleading.*

580. *Amendment of pleadings.*

581. *Title to real estate cannot be questioned before a Justice. Such cases shall be certified to the District Court.*

582. *Change of venue in certain cases. Adjournment on demand of a jury.*

583. *Adjournment not to exceed ten days.*

584. *Adjournment not to exceed four months for same cause.*

585. *No continuance for more than ten days shall be granted, unless upon filing undertaking.*

586. *Failure of either party to appear, effect of.*

587. *Trial by jury. Summoning jury.*

588. *Empanneling the jury. Number necessary to compose a jury.*

589. *If a sufficient number of jurors do not attend, others shall be summoned.*

590. *Challenges to jurors.*

### § 570. *Pleadings in Justices' Courts.*

The pleadings in Justices' Courts shall be :

1st. The complaint by the plaintiff, stating the cause of action ;

2d. The answer by the defendant, stating the ground of the defense.

1. The rule a penal statute must be declared upon by the party seeking a recovery under it, does not apply to pleadings in Justices' Courts. *O'Callaghan v. Booth*, 6 Cal. 66 ; *Hart v. Moon*, Id. 161.

### § 571. *Pleadings, in what cases to be in writing or oral.*

The pleading shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is :

1st. For the foreclosure of any mortgage, or the enforcement of any lien on personal property ;

2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements or other possessions ;

3d. To recover possession of a " mining claim." In other cases the pleading may be oral or in writing.

See Amendments to the Constitution, 1862.

### § 572. *Pleadings, manner of presenting, and form of.*

When the pleadings are oral, the substance of them shall be entered by the Justice in his docket ; when in writing, they shall be filed in his office, and a reference to them made in the docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended.

1. It is not the policy of the law to confine parties to any nice strictness in pleading, particularly before Justices of the Peace ; accordingly, when a party, instead of demurring for informality, goes to trial, it must be considered as cured by the verdict. *Cronise v. Carghill*, 4 Cal. 120.



2. Pleading in Justices' Courts construed with great liberality; and if the facts stated be sufficient to show the nature of the claim or defense, nothing further is required. To reverse a judgment had in such Courts for defects in the complaint, the defects should be such as were calculated to mislead the adverse party. *Stuart v. Lander*, 16 Cal. 372.

### § 573. *Complaint, contents of.*

The complaint shall state in a plain and direct manner the facts constituting the cause of action.

1. A note, with the proper indorsements thereon, filed with a Justice of the Peace, is a sufficient complaint. *Hamilton v. McDonald*, 18 Cal. 128.

### § 574. *Answer, contents of.*

The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or a counter claim, upon which an action may be brought by the defendant against the plaintiff in a Justice's Court.

1. An answer in a Justice's Court, denying generally the allegations of the complaint, conforms substantially to section five hundred and seventy-four of the Practice Act. *Sullivan v. Cary*, 17 Cal. 80.

2. Where a defendant appears for the purpose of taking advantage of irregular summons by motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect. *Deidesheimer v. Brown*, 8 Cal. 339.

3. Nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Id.*

4. Though the Civil Practice Act provides that pleadings in Justices' Courts must in some cases be verified, yet it does not require that the answer should deny specifically the allegations in the complaint; a general denial will be sufficient. *Minturn v. Burr*, 20 Cal.

5. The objection to the jurisdiction on the ground of excess of value of the subject in controversy, is properly taken by answer; and when so taken, should be determined before proceeding to hear the merits of the action. *Small v. Gwin*, 6 Cal. 447.

### § 575. *Statement of insufficient knowledge, etc., shall be deemed a denial.*

A statement in an answer that the party has not sufficient knowledge or information, in respect to a particular allegation in the previous pleading of the adverse party, to form a belief, shall be deemed equivalent to a denial.

### § 576. *Manner of pleading a written instrument.*

When the cause of action or counter claim arises upon an account or instrument for the payment of money only, it shall be sufficient

for the party to deliver a copy of the account or instrument to the Court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The Court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence.

1. A note, with the proper indorsements thereon, filed with a Justice of the Peace, is a sufficient complaint. *Hamilton v. McDonald*, 18 Cal. 128.

§ 577. *If a copy of an instrument be filed, the signature thereon will be deemed admitted, unless denied under oath.*

[1854.] If the plaintiff annex to his complaint, or file with the Justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

§ 578. *Demurrer to pleadings in Justices' Courts.*

Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the Court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

1. It is not the policy of the law to confine parties to any nice strictness in pleading, particularly before Justices of the Peace. Accordingly, where a party, instead of demurring for informality, goes to trial, it must be considered as cured by the verdict. *Cronise v. Carghill*, 4 Cal. 120.

See § 574, Nos. 2 and 3.

§ 579. *Variance between the proof and the allegations in a pleading.*

A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the Court be satisfied that the adverse party has been misled to his prejudice thereby.

§ 580. *Amendments of pleadings.*

The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the Court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary.

1. Pleadings in Justices' Courts are not held to much strictness. Where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 598.

2. A Justice of the Peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications. *Linkart v. Buiff et al.*, 11 Cal. 280.

3. This is a privilege which is never denied, whether the question be one of jurisdiction or otherwise. *Grass Val. Quartz Min. Co. v. Stackhouse*, 6 Cal. 413.

4. It is error to refuse to allow a plaintiff to strike out a claim for damages, without regard to the purpose which may influence him. *Id.*

5. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in Justices' Courts. *Butler v. King*, 10 Cal. 342.

§ 581. *Title to real estate cannot be questioned before a Justice. Such cases shall be certified to a District Court.*

The parties shall not be at liberty to give evidence by which the question of title to real property shall be raised on the trial before a Justice; and if it appear from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the decision of a question of title to real property, the Justice shall suspend all further proceedings in the action, and certify the pleadings; or if the pleadings be oral, a transcript of the same, from his docket to the District Court of the county; and from the time of filing such pleadings or transcript with the County Clerk, the District Court shall have over the action

the same jurisdiction as if it were originally commenced therein. Provided, that when the pleadings or transcript are certified to the District Court upon the answer of the defendant, he shall file an undertaking with two or more sufficient sureties, to be approved by the Justice, to the effect that they will pay all costs of the action, if it be decided against him by the District Court.

1. Where in a suit in a Justice's Court for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the County Court, where the judgment was set aside, and an order made transferring the case to the District Court, where, after trial, plaintiff again had judg-

*Amendment to Sec. 582.—Passed April 25th, 1863.*

[Takes effect sixty days after passage.]

§ 582. If, at any time before the trial, it appear to the satisfaction of the Justice before whom the action is brought, by affidavit of either party, that such Justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such Justice, by reason of the interest, prejudice, or bias of the Justice, the action may be transferred to some other Justice of the same or a neighboring township: and in case a jury be demanded, and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other Justice of the Peace in the county; but only one transfer shall be allowed to either party. The Justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The Justice ordering the transfer of the action to another Justice, shall immediately transmit to the latter, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein. The Justice to whom the case is transferred shall issue a notice, stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in a Justice's Court, or by any person specially deputed by the Justice for that purpose, at least one day before the trial.

§ 580. *Amendments of pleadings.*

The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the Court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary.

1. Pleadings in Justices' Courts are not held to much strictness. Where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 593.

2. A Justice of the Peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications. *Linhart v. Buiff et al.*, 11 Cal. 280.

3. This is a privilege which is never denied, whether the question be one of jurisdiction or otherwise. *Grass Val. Quartz Min. Co. v. Stackhouse*, 6 Cal. 413.

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5. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in Justices' Courts. *Butler v. King*, 10 Cal. 342.

§ 581. *Title to real estate cannot be questioned before a Justice. Such cases shall be certified to a District Court.*

The parties shall not be at liberty to give evidence by which the question of title to real property shall be raised on the trial before a Justice; and if it appear from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the decision of a question of title to real property, the Justice shall suspend all further proceedings in the action, and certify the pleadings; or if the pleadings be oral, a transcript of the same, from his docket to the District Court of the county; and from the time of filing such pleadings or transcript with the County Clerk, the District Court shall have over the action

the same jurisdiction as if it were originally commenced therein. Provided, that when the pleadings or transcript are certified to the District Court upon the answer of the defendant, he shall file an undertaking with two or more sufficient sureties, to be approved by the Justice, to the effect that they will pay all costs of the action, if it be decided against him by the District Court.

1. Where in a suit in a Justice's Court for damages to real property, the answer put in issue the ownership of the property, and the defendant moved to transfer the case to the District Court for trial, which motion was refused; and after trial before the Justice, judgment was rendered for plaintiff, and the defendant appealed to the County Court, where the judgment was set aside, and an order made transferring the case to the District Court, where, after trial, plaintiff again had judg-

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*Amendment to Sec. 582.—Passed April 25th, 1863.*

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§ 582. If, at any time before the trial, it appear to the satisfaction of the Justice before whom the action is brought, by affidavit of either party, that such Justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such Justice, by reason of the interest, prejudice, or bias of the Justice, the action may be transferred to some other Justice of the same or a neighboring township: and in case a jury be demanded, and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other Justice of the Peace in the county: but only one transfer shall be allowed to either party. The Justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The Justice ordering the transfer of the action to another Justice, shall immediately transmit to the latter, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein. The Justice to whom the case is transferred shall issue a notice, stating the time and place when and where the trial will take place, which notice shall be served upon the parties by any officer authorized to serve process in a Justice's Court, or by any person specially deputed by the Justice for that purpose  least one day before the trial.

if the Justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows :

1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours ; when the defendant in attendance is under arrest, the adjournment not to exceed three hours ;

2d. In other cases, not to exceed five days.

1. Where a Justice is interested in the event of a suit, the statute requires that he should transfer the case before another Justice. *Larue v. Gaskins*, 5 Cal. 507.

2. The affidavit must show that the Justice is a necessary, as well as a material witness, and the Justice has no right to judge of its sufficiency. *Board of Commissioners v. Dougherty*, 16 How. Pr. 46.

§ 583. *Adjournment not to exceed ten days for want of material testimony.*

[1854.] The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days, (except as provided in the next section) as follows :

1st. The party asking the adjournment shall, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so ;

2d. The party asking the adjournment shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before the Justice, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections as if the witness were produced. But such objections shall be made at the time of taking the deposition ;

3d. The Court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

§ 584. *Adjournment not to exceed four months, for same cause.*

[1854.] An adjournment may be had, either at the time of joining issue, or at any subsequent time to which the case may stand adjourned, on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of the summons, upon proof by the oath of the party, or otherwise, to the satisfaction of the Justice, that such party cannot be ready for trial before the time to which he desires an adjournment, for want of material evidence, particularly describing it, and that the delay has not been made necessary by any act or negligence on his part since the action was commenced; that he has used due diligence to procure the evidence, and has been unable to do so, and that he expects to procure the evidence at the time stated by him: provided, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered or overruled as improper, the adjournment shall not be had.

§ 585. *No continuance for more than ten days shall be granted, unless upon filing undertaking.*

No adjournment shall be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, with sureties, to be approved by the Justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying.

§ 586. *Failure of either party to appear, effects of.*

If the plaintiff fail to appear at the return day of the summons, the action shall be dismissed. If the defendant fail to appear at the return day of the summons, or if either party fail to attend at a day to which the trial has been adjourned, or fail to make the necessary pleading or proof on his part, the case may, nevertheless, proceed at the request of the adverse party, and judgment shall be given in conformity with the pleadings and proofs.

§ 587. *Trial by jury. Summoning jurors.*

A trial by jury shall be demanded at the time of joining issue,



and shall be deemed waived if neither party then demand it. When demanded, the trial of the case shall be adjourned until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the Justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the Justice, from the citizens of the city or township, and not from the bystanders.

1. Where a party demands a jury trial in a Justice's Court, and neglects to appear on the adjourned day, the Justice may proceed and hear the cause without a jury. *Kilpatrick v. Carr*, 3 Abbot, 117.

§ 588. *Empanneling the jury. Number necessary to compose a jury.*

At the time appointed for the trial, the Justice shall proceed to call, from the jurors summoned, the names of the persons to constitute the jury for the trial of the issue. The jury, by consent of the parties, may consist of any number not more than twelve nor less than three.

§ 589. *If a sufficient number of jurors do not attend, others shall be summoned.*

If a sufficient number of competent and indifferent jurors do not attend, the Justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.

§ 590. *Challenges of jurors.*

Either party may challenge the jurors. The challenges shall be either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in section one hundred and sixty-two. Challenges for cause shall be tried by the Justice in a summary manner, who may examine the juror challenged, and witnesses.

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#### CHAPTER IV.—*Judgment and execution.*

SEC. 591. *Judgment of dismissal entered in certain cases without prejudice.*

592. *Judgment for plaintiff by default.*

- 593. *Upon issue joined, the Justice shall try the cause and render judgment.*
- 594. *Entry of judgment, time and manner of.*
- 595. *If the sum found due exceeds the jurisdiction of the Justice, the excess may be remitted.*
- 596. *Offer to compromise before trial.*
- 597. *Judgment when the defendant is subject to arrest.*
- 598. *Costs shall be added to the verdict.*
- 599. *Execution issued by the Justice, except when it is to run out of the county. Judgment liens, how created.*
- 600. *Execution may issue at any time within five years.*
- 601. *Execution, contents of.*
- 602. *Duty of officer receiving execution. Supplementary proceedings.*

§ 591. *Judgment of dismissal entered in certain cases without prejudice.*

Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1st. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2d. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter;

3d. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.

1. Suit brought in Justice's Court for township No. 5, service on defendant in township No. 3, by Constable of township No. 3. Defendant appears, and before filing answer, moves to dismiss the action, on the grounds: 1st. That the Court has no jurisdiction of the person of defendant; 2d. That the return of the officer is insufficient to give jurisdiction: *Held*, that the motion was properly denied; that defendant could not thus defeat the whole case *in limine* upon the insufficiencies of the record, though the action might be thus dismissed if the facts were shown to be such that the record could not be amended. *Hamilton v. McDonald*, 18 Cal. 128.

§ 592. *Judgment for plaintiff by default.*

When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

1st. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the Justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons;

2d. In other cases, the Justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

1. A judgment by default rendered in a Justice's Court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, indorsed on the summons by the officer serving it, and filed with the Justice who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Id.*

2. Such certificate is sufficient, *prima facie*, to establish the jurisdiction of the Justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Fagg v. Clements*, 16 Cal. 389.

3. Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the Court of First Instance, at ten o'clock, and judgment was rendered against them at nine o'clock, in the morning of the same day: *Held*, that the judgment was irregular, and should be reversed; notwithstanding the Court offered them permission to come in at a subsequent day and make their defense. *Parker v. Sheppard*, 1 Cal. 131.

4. Where a Justice, by statements which are untrue, that defendant is not intending to appear, is induced to take up a cause at an unusual time, *e. g.*, while engaged in the trial of another cause, a judgment rendered by him in favor of the plaintiff will be reversed. *Beach v. McCann*, 4 Abbott, 18.

§ 593. *Upon issue joined, the Justice shall try the cause and render judgment.*

Upon issue joined, if a jury trial be not demanded, the Justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.

§ 594. *Entry of judgment, time and manner of.*

[1854.] Upon a verdict, the Justice shall immediately render judgment accordingly. When the trial is by the Justice, judgment shall be entered immediately after the close of the trial; if the defendant has been arrested and is still in custody; in other cases, it shall be entered within four days after the close of the trial; if the action be on contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served, if the contract be a several or a joint and several contract; but if the con-

tract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the separate property of the defendants served.

1. Where a judgment rendered by a Justice of the Peace is for an amount exceeding his jurisdiction, the County Court, on appeal, should dismiss the whole case. *Ford v. Smith*, 5 Cal. 331.

2. A Justice, after having entered a judgment according to law, has no right to alter it without notice to the defendant. *Chester v. Miller*, 13 Cal. 561.

§ 595. *If the sum found due exceed the jurisdiction of the Justice, the excess may be remitted.*

When the amount found due to either party exceeds the sum for which the Justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

§ 596. *Offer to compromise before trial.*

If the defendant at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the  
~~plaintiff shall immediately have judgment therefor with the costs~~

1st. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the Justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons;

2d. In other cases, the Justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

1. A judgment by default rendered in a Justice's Court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, indorsed on the summons by the officer serving it, and filed with the Justice who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Id.*

2. Such certificate is sufficient, *prima facie*, to establish the jurisdiction of the Justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Fagg v. Clements*, 16 Cal. 389.

3. Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the Court of First Instance, at ten o'clock, and judgment was rendered against them at nine o'clock, in the morning of the same day: *Held*, that the judgment was irregular, and should be reversed; notwithstanding the Court offered them permission to come in at a subsequent day and make their defense. *Parker v. Sheppard*, 1 Cal. 131.

4. Where a Justice, by statements which are untrue, that defendant is not present

*Amendment to Sec. 594.—Passed April 25th, 1863.*

[Took effect on passage.]

§ 594. Upon a verdict, the Justice shall immediately render judgment accordingly. When the trial is by the Justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within four days after the close of the trial. If the action be on a contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served, or have voluntarily appeared, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the individual property of the defendants served, or who have voluntarily appeared in the action. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.

tract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the separate property of the defendants served.

1. Where a judgment rendered by a Justice of the Peace is for an amount exceeding his jurisdiction, the County Court, on appeal, should dismiss the whole case. *Ford v. Smith*, 5 Cal. 331.

2. A Justice, after having entered a judgment according to law, has no right to alter it without notice to the defendant. *Chester v. Miller*, 13 Cal. 561.

§ 595. *If the sum found due exceed the jurisdiction of the Justice, the excess may be remitted.*

When the amount found due to either party exceeds the sum for which the Justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

§ 596. *Offer to compromise before trial.*

If the defendant at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided.

§ 597. *Judgment when the defendant is under arrest.*

When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment and entered in the docket.

§ 598. *Costs shall be added to the verdict.*

When the prevailing party is entitled to costs by this chapter, the Justice shall add their amount to the verdict; or in case of a failure of the plaintiff to recover, or in case of a dismissal of the action, shall enter up judgment in favor of the defendant for the amount of such costs.

§ 599. *Execution issued by the Justice, except when it is to judgment liens, how created.*

[1854.] The Justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the Clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the County Clerk shall be noted by him thereon, and entered in the docket; and from that time executions may be issued by the County Clerk on such judgments to the Sheriff of any other county of the State, in the same manner as upon judgments recovered in the higher Courts. All process upon judgments recovered in Justices' Courts, to be executed within the same county, shall be issued by the Justice or his successors in office. No judgment rendered by a Justice of the Peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the Justice, be filed and recorded in the office of the Recorder. When such transcript is to be filed in any other county than that in which the Justice resides, such transcript shall be accompanied with the certificate of the County Clerk as to the official character of the Justice. When so filed and recorded in the office of the Recorder for any county, such judgment shall constitute a lien upon, and bind the lands and tenements of the judgment debtor, situated in the county where such transcript may be filed and recorded, in favor of such judgment creditor, as if such judgment had been rendered in the District Court of such county.

§ 600. *Execution may issue at any time within five years.*

Execution for the enforcement of a judgment in a Justice's Court may be issued, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

1. The loss of the docket of the Justice will not prevent the statute from running. *White v. Clark*, 8 Cal. 512.

2. An execution can only be issued upon a judgment obtained before a Justice of the Peace, within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time. *Id.*

3. An action will lie on a judgment in a Justice's Court in this State, even when the time within which an execution could be issued on such judgment has expired. *Stuart v. Lander*, 16 Cal. 372.

4. Unless an execution issue within five years, the judgment is void; nor will the loss of the Justice's docket prevent the time from running. *White v. Clark*, 8 Cal. 512.

§ 601. *Execution, contents of.*

The execution, when issued by a Justice, shall be directed to the Sheriff or to a Constable of the county, and subscribed by the Justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed. It shall intelligibly refer to the judgment by stating the names of the parties, and the name of the Justice before whom, and of the county, and the township or city where, and the time when it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It shall contain, in like cases, similar directions to the Sheriff or Constable as are required by the provisions of Title VII, of this Act, in an execution to the Sheriff.

1. Under sections six hundred and one and six hundred and two of the Practice Act, a Constable may serve an execution out of his township. *Lafontaine v. Greene*, 17 Cal. 294.

§ 602. *Duty of officer receiving execution. Supplementary proceedings.*

[1854.] The Sheriff or Constable to whom the execution is directed; shall proceed to execute the same in the same manner as the Sheriff is required by the provisions of Title VII, of this Act, to proceed upon executions directed to him; and the Constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the Sheriff; and after issuing an execution, and either before or after its return, (if the same be returned unsatisfied either in whole or in part) the judgment creditor shall be entitled to an order from the Justice, requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such Justice, and the attendance of such debtor may be enforced by the Justice. On his attendance, such debtor may be examined under oath concerning his property; and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor, may also be required to attend and be examined, and the Justice may order any property in the hands of the judgment debtor, or any other person, not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment, and the Justice may enforce such order by imprisonment until complied with; but no



judgment debtor or other person shall be required to attend before the Justice out of the county in which he resides.

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CHAPTER V.—*General provisions.*

- SEC. 603. *The provisions of this Act referred to in this title only shall apply to Justices' Courts.*
604. *Justice's docket, contents of.*
605. *Entries therein shall be under the title of the action. The docket shall be primary evidence of the facts it contains.*
606. *An index to the docket shall be kept.*
607. *Dockets shall be delivered by the Justice to his successor, or to the County Clerk.*
608. *A Justice may issue execution, or other process, upon the docket of his predecessor.*
609. *Successor of a Justice, who shall be deemed.*
610. *If two Justices might be deemed successor, the County Judge shall designate one.*
611. *Blanks shall be filled in all papers issued by a Justice, except subpoenas.*
612. *In case of disability of a Justice, another Justice may attend on his behalf.*
613. *The Justice may depute a person to serve a summons or execution; Justice liable for acts of such deputy.*
614. *Authority and obligations of deputy.*
615. *A Constable, after the expiration of his term, may execute final process previously commenced.*
616. *Contempts, a Justice may furnish for.*
617. *Proceedings and punishment for contempts.*
618. *The conviction shall be entered in the docket.*
619. *Justices may issue subpoenas and final process to any part of the county.*
620. *Provisions of Title XI applicable to Justices' Courts.*
621. *Mining claims, actions concerning, shall be governed by the usages of the bar or diggings.*
622. *A new trial may be granted in certain cases.*

- 623. *Application for new trial.*
- 624. *Appeals from a judgment of a Justice may be taken to a County Court.*
- 625. *Party appealing on questions of law alone shall prepare a statement. Settlement of statement.*
- 626. *If the appeal be on questions of fact, or law and fact, no statement need be made.*
- 627. *Upon the appeal, the Justice shall transmit the case to the County Court.*
- 628. *Undertaking on appeal. Justification of sureties.*
- 629. *On filing undertaking, execution shall be stayed.*
- 630. *Repealed.*
- 631. *Costs allowed to prevailing party.*
- 632. *Repealed.*
- 633. *Money collected by Constable or Sheriff shall be paid over to the Justice.*
- 634. *Justice may require security for costs.*
- 635. *Preceding sections applicable to Justices' Courts.*

§ 603. *The provisions of this Act referred to in this title only shall be applicable to Justices' Courts.*

[1853, 1854.] Those provisions of this act which are referred to in this title, and no other, shall in addition to the provisions embraced in this title, be applicable to Justices' Courts and proceedings therein.

§ 604. *Justice's docket, contents of.*

[1855.] Every Justice shall keep a book denominated a "docket," in which he shall enter:

- 1st. The title of every action or proceeding;
- 2d. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;
- 3d. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of these facts;
- 4th. The time when the parties or either of them appear, or their nonappearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a con-

cise statement of the material parts of the pleadings, and of all motions made during the trial by either party, and his decisions thereon;

5th. Every adjournment, stating on whose application, whether on oath, evidence, or consent, and to what time;

6th. The demand for a trial by jury, when the same is made, and by whom made; the order for the jury, and the time appointed for the trial and return of the jury;

7th. The names of the jury who appear and are sworn; the names of all witnesses sworn, and at whose request;

8th. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge;

9th. The judgment of the Court, specifying the costs included and the time when rendered;

10th. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the Justice, and when and by whom;

11th. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

1. The failure of a Justice of the Peace to state in his docket that the summons was returned "served," will not vitiate the judgment on appeal. The fact of service may be shown by the return of the officer on the summons. *Denmark v. Liening*, 10 Cal. 93.

2. The record of the proceedings in a Justice's Court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are *coram non judice* and void; and the failure of defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Lowe v. Alexander*, 15 Cal. 296.

3. The recital in the docket of a Justice, who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself; and if the return fail to show sufficient service, the recital being based on the return alone, amounts to nothing more than the opinion of the Justice, and cannot be relied on to give validity to the judgment. *Id.*

§ 605. *Entries therein shall be under the title of the action. The docket shall be primary evidence of the facts it contains.*

The several particulars of the last section specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a Justice's docket, or a transcript thereof, certified by the Justice or his successor in office, shall be primary evidence to prove the facts so stated therein.

§ 606. *An index to the docket shall be kept.*

A Justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a  
~~to the names of the parties~~ The names of the plaintiffs shall

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*Amendments to Secs. 607 and 608.—Passed April 8th, 1863.*

[To take effect immediately.]

§ 607. It shall be the duty of every Justice of the Peace, upon expiration of his term of office, to deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody be kept as public records. If the office of a Justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such Justice shall be deposited in the office of some other Justice in the township, to be by him delivered to the successor of said Justice: and while in his possession, he may execute on a judgment there entered and unsatisfied, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done. If there be no other Justice in the township, then the dockets and papers of such Justice shall be deposited in the office of the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

§ 608. Any Justice with whom the docket of his predecessor is deposited shall have and exercise over all actions and proceedings entered in the docket of his predecessor, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, or a Justice into whose hands the docket of a Justice formerly acting as such within the same territory may come, shall for the purposes of this section, be considered the successor of said former Justice.

of the Justice whose office became vacant at the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time shall be deemed the successor.

cise statement of the material parts of the pleadings, and of all motions made during the trial by either party, and his decisions thereon;

5th. Every adjournment, stating ~~on whose application, whether~~

and when they occur. Such entries in a Justice's docket, or a transcript thereof, certified by the Justice or his successor in office, shall be primary evidence to prove the facts so stated therein.

§ 606. *An index to the docket shall be kept.*

A Justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family name.

§ 607. *Dockets shall be delivered by the Justice to his successor, to the County Clerk.*

It shall be the duty of every Justice, upon the expiration of his term of office, to deposit with his successor his official dockets, as well as his own as those of his predecessors, which may be in his custody, to be kept as public records. If the office of a Justice become vacant by his death, or removal from the township or city, or otherwise, before his successor is elected and qualified, the dockets in the possession of such Justice shall be deposited with the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

§ 608. *A Justice may issue execution, or other process, upon the docket of his predecessor.*

[1855.] Any Justice with whom the docket of his predecessor is deposited, may issue execution or other process upon a judgment there entered and unsatisfied, in the same manner and with the same effect as the Justice by whom the judgment was entered might have done. In case of the creation of a new county, or the change of the boundary between two counties, any Justice into whose hands the docket of a Justice formerly acting as such within the same territory may come, shall, for the purposes of this section, be considered the successor of said former Justice.

§ 609. *Successor of a Justice, who shall be deemed.*

The Justice elected to fill a vacancy shall be deemed the successor of the Justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time shall be deemed the successor.

§ 610. *If two Justices might be deemed successors, the County Judge shall designate one.*

When two or more Justices are equally entitled under the last section to be deemed the successors in office of the Justice, the County Judge shall, by a certificate subscribed by him and filed in the office of the County Clerk, designate which Justice shall be the successor of a Justice going out of office, or whose office has become vacant.

§ 611. *Blanks shall be filled in all papers issued by a Justice, except subpoenas.*

The summons, execution, and every other paper made or issued by a Justice, except a subpoena, shall be filed without a blank left to be filled by another, otherwise it shall be void.

§ 612. *In case of disability of a Justice, another Justice may attend on his behalf.*

In case of the sickness, or other disability, or necessary absence of a Justice on a return of a summons, or at the time appointed for a trial, another Justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the Justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending Justice, subscribed by him, shall be made in the docket of the Justice before whom the summons was returnable. If the case be adjourned, the Justice before whom the summons was returnable may resume jurisdiction.

§ 613. *The Justice may depute a person to serve a summons or subpoena. Justice liable for acts of such deputy.*

[1860.] The Justice may, at the request of a party, and on being satisfied that it is expedient, specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution, with or without an order to arrest the defendant, or with or without a writ of attachment. The said Justice shall be liable on his official bond for all official acts of the person so deputed. Such deputation shall be in writing, on the process.

§ 614. *Authority and obligations of a deputy.*

The person so deputed shall have the authority of a Constable in relation to the service, execution and return of such process, and shall be subject to the same obligations.

§ 615. *A Constable, after the expiration of his term, may execute papers previously commenced.*

A Constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he still continued in office, and his sureties shall be liable to the same extent.

§ 616. *Contempts, a Justice may punish for.*

A Justice may punish as for contempt, persons guilty of the following acts, and no other :

1st. Disorderly, contemptuous, or insolent behavior towards the Justice while holding the Court, tending to interrupt the due course of a trial or other judicial proceeding ;

2d. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the Justice, or in the immediate vicinity of the Court held by him, tending to interrupt the due course of trial or other judicial proceeding ;

3d. Disobedience or resistance to the execution of a lawful order or process made or issued by him ;

4th. Disobedience to a subpoena duly served, or refusing to be sworn, or answer as a witness ;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order or process of the Court held by him.

§ 617. *Proceedings and punishments for contempts.*

When a contempt is committed in the immediate view and presence of the Justice, it may be punished summarily, for which an order shall be made reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Justice, a warrant of arrest may be issued by such Justice, on which the person so guilty may



be arrested and brought before the Justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The Justice may thereupon discharge him, or may convict him of the offense. A Justice may punish for contempts by fine, or imprisonment, or both ; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

§ 618. *The conviction shall be entered in the docket.*

The conviction, specifying particularly the offense and the judgment thereon, shall be entered by the Justice in his docket.

§ 619. *Justices may issue subpoenas and final process to any part of the county.*

Justices of the Peace may issue subpoenas in any action or proceeding in the Courts held by them, and final process on any judgment recovered therein to any part of the county.

§ 620. *Provisions of Title XI applicable to Justices' Courts.*

Justices of the Peace may issue commissions to take the depositions of witnesses out of this State, and settle interrogatories to be annexed thereto, and direct the manner in which the commissions shall be returned. The provisions of Title XI of this Act, so far as the same are consistent with the jurisdiction and powers of Justices' Courts, shall be applicable to Justices' Courts, and to actions and proceedings therein.

§ 621. *Mining claims, actions concerning, shall be governed by the usages of the bar or diggings.*

In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim ; and such customs, usages or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action.

1. **Jurisdiction of Justice's Court.**—Where the value of a mining claim exceeds two hundred dollars, Justices of the Peace have no jurisdiction. *Small v. Gwinn*, 6 Cal. 447.

2. The objection to the jurisdiction, on the ground of excess of value of the subject of controversy, is properly taken by answer ; and when not taken, should be first determined before proceeding to hear the merits of the case. *Id.*

3. **Evidence, witnesses, customs, usages, regulations, etc.**—Mining laws when introduced in evidence, are to be construed by the Court, and the question, whether by such laws a forfeiture had accrued, is a question of law, and cannot, therefore, be properly submitted to a jury. *Fairbank v. Woodhouse*, 6 Cal. 433.

4. A witness in an action for a disputed mining claim, who was in the employ of the party in possession, at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent, when his wages are not dependent upon the sufficiency of such proceeds. *Yankee Co. v. Oregon Co.*, 7 Cal. 40.

5. Miners have the power to prescribe the rules governing the acquisition and direction of the titles to this class of claims, and their extent, subject only to the

*Amendment to Sec. 619.—Passed April 25th, 1863.*

[Takes effect sixty days after passage.]

§ 619. Justices of the Peace may issue subpoenas in any action or proceeding in the Courts held by them, and final process, on any judgment recovered therein, to any part of the county. A Justice of the Peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the Courts held by him. Such summons shall be served and returned in like manner as a subpoena issued by a Justice. Any person so summoned shall, for a failure to attend at the time and place named in the summons, be deemed guilty of a contempt, and may be punished accordingly.

12. The Act of 1855, (comp. 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

13. Where parol evidence is given of certain regulations of miners, and it does not appear, until the cross-examination of the witness, that the regulations were in writing, the proper course to pursue, if any objection is taken to the evidence, is by motion to strike it out. *Kiler et als. v. Kimball*, 10 Cal. 267.

14. Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be rerecorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining claim, to show that the rules of the vicinage had been complied with. *McGarrity v. Byington et al.*, 12 Cal. 426.

15. Plaintiffs having offered in evidence the book where mining claims are recorded according to mining rules, to show title in the original locators, then offered the entry in that book of the transfer of said claims, from such locators to the lessors of plaintiffs as proof of the fact of transfer. The Court excluded this entry until proof *aliunde* of the transfer: *Held*, that this entry was inadmissible as proof of such transfer—there appearing no mining regulation which makes the entry of the Recorder primary evidence of the fact of transfer. *Atwood & Walker v. Fricot*, 17 Cal. 37.

16. Such book was admissible to show compliance with the rules of the mining

be arrested and brought before the Justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The Justice may thereupon discharge him, or may convict him of the offense. A Justice may punish for contempts by fine, or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

~~§ 619 m~~

proceedings in Justice Courts, and to actions and proceedings therein.

§ 621. *Mining claims, actions concerning, shall be governed by the usages of the bar or diggings.*

In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the constitution and laws of this State, shall govern the decision of the action.

1. **Jurisdiction of Justice's Court.**—Where the value of a mining claim exceeds two hundred dollars, Justices of the Peace have no jurisdiction. *Small v. Gwinn*, 6 Cal. 447.

2. The objection to the jurisdiction, on the ground of excess of value of the subject of controversy, is properly taken by answer; and when not taken, should be first determined before proceeding to hear the merits of the case. *Id.*

**3. Evidence, witnesses, customs, usages, regulations, etc.—** Mining laws when introduced in evidence, are to be construed by the Court, and the question, whether by such laws a forfeiture had accrued, is a question of law, and cannot, therefore, be properly submitted to a jury. *Fairbank v. Woodhouse*, 6 Cal. 433.

4. A witness in an action for a disputed mining claim, who was in the employ of the party in possession, at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent, when his wages are not dependent upon the sufficiency of such proceeds. *Yankee Co. v. Oregon Co.*, 7 Cal. 40.

5. Miners have the power to prescribe the rules governing the acquisition and divesture of the titles to this class of claims, and their extent, subject only to the general laws of the State. *English v. Johnson*, 17 Cal. 107.

6. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring v. Crow*, 11 Cal. 366.

7. It is a very convenient rule in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant from the Government, of mines, water privileges, and the like, to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

8. Where a mining company sues for damages for trespasses committed on their claims during March, April and May, a person who owned an interest in the claim during January, February and March, but had sold out to the company on the first of April, is not a competent witness for the plaintiffs, even though when offered, the witness executes an assignment to plaintiffs of his interest in the damages. *Columbus Co. v. Dayton Co.*, 18 Cal. 615.

9. *English v. Johnson*, (17 Cal.) that the quantity of ground a miner can claim by location, or prior appropriation for mining purposes, may be limited by the mining rules of the district, affirmed. *Prosser v. Parks*, 18 Cal. 47.

10. The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners, does not invalidate them. Courts will not inquire into the regularity of the modes in which these local Legislatures, or primary assemblages act. They must be the judges of their own proceedings. It is sufficient that the miners agree—whether in public meeting or after due notice—upon their local laws, and that these are recognized as the rules of the vicinage, unless fraud be shown, or other like cause for rejecting the laws. *Gove v. McBrager*, 18 Cal. 582.

11. The mining rules of the District cannot limit the quantity of ground or the number of claims a party may acquire by purchase. *Prosser v. Parks*, 18 Cal. 47.

12. The Act of 1859, (chap. 97) respecting the mines; the Practice Act of 1851, (sec. 621) relative to proof in actions respecting mining claims; the Act of 1852, relative to possessory actions, commented on, and the conclusion reached that, so far as they touched the question of a license from the State to mine, they refer to public lands alone. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

13. Where parol evidence is given of certain regulations of miners, and it does not appear, until the cross-examination of the witness, that the regulations were in writing, the proper course to pursue, if any objection is taken to the evidence, is by motion to strike it out. *Kiler et als. v. Kimball*, 10 Cal. 267.

14. Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be rerecorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining claim, to show that the rules of the vicinage had been complied with. *McGarrity v. Byington et al.*, 12 Cal. 426.

15. Plaintiffs having offered in evidence the book where mining claims are recorded according to mining rules, to show title in the original locators, then offered the entry in that book of the transfer of said claims, from such locators to the lessors of plaintiffs as proof of the fact of transfer. The Court excluded this entry until proof *aliunde* of the transfer: *Held*, that this entry was inadmissible as proof of such transfer—there appearing no mining regulation which makes the entry of the Recorder primary evidence of the fact of transfer. *Atwood & Walker v. Fricot*, 17 Cal. 37.

16. Such book was admissible to show compliance with the rules of the mining

district, and this particular entry admissible to show compliance with the miners' rule requiring transfers to be recorded. *Id.*

17. A bill of sale of a mining claim is sufficiently proved when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor is proven. And this, though the subscribing witness was in the State after suit was instituted, and near the time of trial, and plaintiff used no efforts to get the testimony of the witness before he left the State. *Jackson v. Feather River Water Co.*, 14 Cal. 18.

18. **Mode of acquiring mining claims.**—A misdescription in the notice of the claimant to a quartz lead, posted up near the premises, in pursuance of the requirements of the mining laws of the district in which the lead is situated, and where the lead is under ground and undeveloped, will not vitiate the claim. *Johnson v. Parks*, 10 Cal. 446.

19. The mode of acquiring and the extent of a mining claim, must be in conformity with the local rules of miners; but, *query*, can the local regulations alter the general rules of the right of holding property by creating a new and arbitrary rule, or by abrogating the old rules? *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

20. The usual mode of taking up mining claims, is to put upon the claim a written notice that the party has located it; and this taking up and giving notice may be done by a party personally, or by any one for him, or with his assent or approval; and whenever the appropriation is made by an agent having authority from a principal to make it, the act is complete and the title vests in the principal, and the agent by his mere act cannot subsequently divest it. *Gore v. McBrager*, 18 Cal. 582.

21. **Recording mining claims.**—The question as to the necessity of recording mining claims reserved. *Partridge v. McKinney*, 13 Cal. 158.

22. **Two locations for different purposes may be made of the same ground.**—One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes will not conflict. *O'Kieffe v. Cunningham*, 9 Cal. 589.

23. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another, but in that case his mining right will be subject to the prior right of deposit. *Id.*

24. **Priority of location, right of parties.**—The policy of this State as indicated by her legislation in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels. *Irwin v. Phillips et al.*, 5 Cal. 140.

25. These two rights stand upon an equal footing, and when they conflict they must be decided by the fact of priority. *Id.*

26. The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. *Id.*

27. The wants of mining communities demand some facilities for the business of mining, and persons settled in good faith upon lots in the mining towns and carrying on business should be reasonably protected. *Fitzgerald v. Urton*, 5 Cal. 308.

28. A prior appropriation of the public domain establishes a *quasi* private proprietorship, which entitles the owner to be protected in its quiet enjoyment against all the world but the true owner, except in the case of agricultural and grazing lands, as against the privileges granted to miners. *Tartar v. Spring Creek Co.*, 5 Cal. 395.

29. A prior locator of a mining claim on the bank of a stream had the right to the use of the bed of the stream for the purpose of fluming or working his claim, and any subsequent erection, dam or embankment which will turn the water back upon such claim, or hinder it from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions. *Sims v. Smith*, 7 Cal. 148.

30. Plaintiffs are owners of mining claims located in the bed of a creek, and

defendants own claims situated on a hill in the vicinity; the refuse matter washed from defendants' claims is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located, and are valuable only for the gold they contain: *Held*, that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the opportunity to enjoy, and defeat the object for which they were located and taken possession of. *Logan v. Driscoll*, 19 Cal. 623.

31. The rule, *qui prior est in tempore potior in jure*, applies in such cases. *Id.*

32. The position, that so long as the use made by defendants of their claims is not in itself unlawful, plaintiffs cannot complain of its effect upon them, is untenable, because no use is lawful which precludes plaintiffs from the enjoyment of their rights. *Id.*

33. **Possession without reference to mining rules.**—In the absence of any mining rule declaring that a failure to record a claim avoids the entry or claim, a party may take actual possession of mineral land, though in taking possession he does not observe the requirements as to registry and the like acts prescribed by the local laws. But if he take more land than these rules allow, this would not give him title to the excess against any one subsequently entering, who complies with the laws and takes up such excess in accordance with them. *English v. Johnson*, 17 Cal. 107.

34. In suit for mining claims, the Court charged the jury in effect, that possession taken of a mining claim without reference to mining rules, was sufficient as against one entering by no better title, to maintain the action; and further, that the possession need not be evidenced by actual inclosure, but "if the ground was included within distinct, visible, and notorious boundaries, and if plaintiffs were working a portion of the ground within those boundaries," this was enough against one entering without title: *Held*, that the instruction was right; that though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a possession not so taken is good against one taking possession in the same way, and that the actual prior possession of the first occupant would be better than the subsequent possession of the last. *Id.*

35. **Possession, what constitutes, its extent, how far protected.**—Actual possession of a portion of a mining claim, according to the custom of mines, in a given locality on the Yuba river, extends by construction to the limits of the claim held in accordance with such customs. *Hicks v. Bell*, 3 Cal. 219.

36. In permitting persons to go upon public lands occupied by others for the purpose of mining, the Legislature has legalized what would otherwise have been a trespass, and the act cannot be extended by implication to a class of cases not specially provided for. *Fitzgerald v. Urton*, 5 Cal. 308; *Burge v. Underwood*, 6 Cal. 45.

37. The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. *Id.*

38. The fact that the parties who are in possession of a gold mine are foreigners, and have obtained no license, affords no apology for trespassers; the State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell v. Hagood*, 6 Cal. 148.

39. In an action of ejectment against a company and one L., where the Court found that the company was in possession and that L. was not, and gave judgment against the company only, L. is not precluded from showing his possession in any future proceedings; his right to the possession, if he has any, is not concluded by the judgment and finding. Such judgment determines only the fact that L. was not in the actual possession. *Kimball v. Gearhart*, 12 Cal. 27.

40. Mere entry and possession give no right to the exclusive enjoyment of any given quantity of the public mineral lands of the State. *Smith v. Doe*, 15 Cal. 100.

41. No acts are required as evidence of the possession of a mining claim other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, nor build on it, nor cultivate it, nor inclose it. He may be in possession by himself, or by his agents or servants. *English v. Johnson*, 17 Cal. 107.

42. As to the extent of a miner's possession, where he enters under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. *Id.*

43. Fences are not requisite around mining claims. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor; and by common understanding, the going upon a claim to work it is an appropriation of the entire claim. Especially if that claim can be appropriated to that extent by location by one man. *Id.*

44. Where plaintiff claims, under purchase and location, a small tract of mineral land, with demarked limits, of which he is in possession, and there is no proof on the trial that the extent of his claim is opposed to the local rules, the presumption is that his possession is rightful and not wrongful. *Id.*

45. In such case, the plaintiff need not show in the first instance that he was in possession in accordance with the local laws; but may (as a vendee under a deed may as to other land) make a *prima facie* case upon possession, and this is enough until the defendant shows that the possession is wrongful, because in violation of rules which justify him in going upon the premises and working them. *Id.*

46. So if a party enters upon a mining claim *bona fide*, under color of title, as under a deed or lease, the possession of part, as against any one but the true owner or prior occupant, is the possession of the entire claim described by the paper; and this, though the paper did not convey the title. A third person could not invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger with which he had no connection. *Atwood v. Fricot*, 17 Cal. 37.

47. A mining claim must be in some way defined as to limits before the possession of or working upon part gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim. *Id.*

48. Mining claims are held by possession; but that possession is regulated and defined by usage and local and conventional rules; and the "actual possession" which is applied to agricultural land, and which is understood to be a *possessio pedis*, cannot be required in case of a mining claim in order to give a right of action for the invasion of it. *Id.*

See *post*, No. 104.

49. **Boundaries.**—In the absence of mining regulations, the fact that a party has located a claim bounded by another, raises no implication that the last located claim corresponds in size or in the direction of its lines with the former. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.

50. Where two several mining companies agree upon a boundary line between the claims of the two companies, and, subsequently, other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line. *McGee v. Stone*, 9 Cal. 600.

51. The fact that such line was fixed by a mistake as to the true boundaries and corners makes no difference, as the subsequent purchasers purchased with a view to this line. *Id.*

52. **When miners may lawfully enter upon agricultural and other lands.**—The statute making possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners, has legalized what would otherwise be a trespass; and the act cannot be extended by implication to a class of cases not especially provided for. *Weimer v. Lowery*, 11 Cal. 104.

53. The Act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right of entry upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is invalid. *Gillan v. Hutchinson*, 16 Cal. 153.

54. Miners have no such absolute and unconditional right. The true rule is laid down in *Smith v. Doe* (15 Cal. 100). *Id.*

55. The general rule, that the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining, has its limitations, to be fixed by the facts of each particular

case. Certain possessory rights and rights of property in the mining region, though not founded on a valid legal title, will be protected against the miner—as valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc. *Smith v. Doe*, 15 Cal. 100.

56. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land, in the mining district, as against persons who subsequently enter upon the land, in good faith, for the purpose of digging for gold therein, and who, in such operations, do no injury to the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business. *Martin & Davis v. Browner*, 11 Cal. 12.

57. Miners have a right to enter upon public mineral land, in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist; and this, whether the land is inclosed or taken up under the Possessory Act. *Clark v. Duval*, 15 Cal. 85.

58. A person who settles for agricultural purposes upon any of the mining lands of this State, settles upon such lands subject to the rights of miners, who may proceed in good faith to extract any valuable metals there may be found in the lands so occupied by the settler in the most practicable manner in which they can be extracted, and with the least injury to the occupying claimant. *McClintock v. Bryden*, 5 Cal. 97.

59. Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: *first*, that the land is public land; *second*, that it contains mines or minerals; *third*, that he enters for the *bona fide* purpose of mining. And such justification must be affirmatively pleaded in the answer, with all the requisite averments, to show a right under the statute or by law to enter. *Lentz v. Victor*, 17 Cal. 271.

60. **Miners cannot enter upon private lands.**—A miner has no right to dig or work within the inclosure surrounding a dwelling house, corral, or other improvements of another. *Burge v. Underwood*, 6 Cal. 45.

61. Miners have no right to enter upon private land, and subject it to such uses as may be necessary to extract the precious metals which it contains. *Henshaw v. Clark and one hundred and three Chinamen*, 14 Cal. 460.

62. No license from the United States or the State of California to miners to enter upon the private lands of individuals, for the purpose of extracting the minerals in the soil, exists. *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

63. Plaintiffs take up two hundred and twelve acres of land under the Possessory Act of this State, inclose it, and plant it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying the plaintiff the money value of the trees, etc. Plaintiff sues for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: “We, the jury, award the plaintiff forty-two dollars damages.” Judgment accordingly, the Court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit: *Held*, that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespassers should issue; that the nature of the property destroyed and threatened to be destroyed is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him. *Daubenspeck v. Grear*, 18 Cal. 443.

64. **Water and water courses.**—Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent on the ownership of the land through which the water flows. Such appropriation cannot be constructive. (*Kelly v. The Natoma W. Co.*, 6 Cal. 105.) The erection of a dam across a natural water course is an actual appropriation of the water at that point, but not below it; even though the water flowing over the dam is brought into the water course by canals constructed by the owners of the dam. *Id.*

65. Where water from an artificial ditch is turned into a natural water course and mingled with natural water of the stream, for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out



and used by the party thus conducting it, so that he do not, in so doing, diminish the quantity of the natural waters of the stream to the injury of those who have previously appropriated such natural waters. *Butte Canal & Ditch Co. v. Vaughan*, 11 Cal. 143.

66. The first appropriator of the water of a stream passing through the public lands in this State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters, and divert an equal quantity, as often as they choose. *Id.*

67. The burden of proof devolves on the party thus mingling the water belonging to him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Id.*

68. Where parties projecting a ditch to convey water, give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it. *Kimball et al. v. Gearhart*, 12 Cal. 27.

69. In appropriating unclaimed water on the public lands, only such acts are necessary, and such indications and evidences of the appropriation required, as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable—surveys, notices, stakes and blazing of trees, followed by work and actual labor, without abandonment, will in every case, where the work is completed, give title to the water over subsequent claimants. *Id.*

70. The mere act of commencing a ditch with the intention of appropriating the water, is not sufficient of itself to give a party an exclusive right to the water of such stream. *Id.*

71. The title to the water conveyed through a ditch constructed in such manner, will, on completion of the work, date back from the beginning of the work, as against subsequent appropriations. *Id.*

72. Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows. *Id.*

73. Where parties commence the construction of a ditch, who have not at the time the pecuniary means requisite to complete the same in a reasonable time, and they project the work and claim the water, with a full knowledge of their pecuniary inability to complete the same within a reasonable time, they cannot urge such want of means as an excuse for not prosecuting the work. *Id.*

74. The doctrine of relation in the appropriation of water, only applies when the first act, from which the party appropriating seeks to date his right, indicated the intention of appropriating such water. *Id.*

75. V. erects a mill and acquires a water right in 1850. In 1851, defendants appropriate for ditch purposes, water from the same stream, forty miles above the mill. In 1854, plaintiffs, M. and B. succeeded to the possession of V.: *Held*, that plaintiffs may, possibly, recover damages for the diversion of the water, on their possession, without connecting themselves with the title of V. back to 1850; that defendant's appropriation in 1851 could only be of the water not appropriated by V., there being no abandonment by him; and that M. and B. can jointly maintain an action for damages accruing after they came into possession. *Id.*

76. *Arguendo*: Right to water acquired by appropriation may be transferred like other property. *Id.*

77. *Arguendo*: Where a party takes up a mill-seat on public agricultural land, erects a saw-mill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist-mill erected at the same place years afterward. *McDonald & Blackburn v. Bear River and Auburn Water & Mining Company*, 13 Cal. 220.

78. *Arguendo*: If, by the erection of a mill, and the possessory right of land on

a stream, the water be acquired, a transfer of the possession of the property to a vendee, as owner, passes the water right. *Id.*

79. *Arguendo*: An appropriation of water for mill purposes, stands on the same footing as an appropriation for the use of miners. *Id.*

80. The owner of a ditch has the exclusive and absolute power of control, and right of enjoyment of the water diverted by and flowing in his ditch; but whether such water be his private property, it is not necessary to decide. *Kidd v. Laird*, 15 Cal. 161.

81. A person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. *Id.*

82. This right so to change the point of diversion does not depend upon how the right to use the water was acquired, whether by express grant or by prescription; or whether it rests in the parol license, or the presumed consent of the proprietor. The difference as to the source of the right relates to the mode of determining its existence and extent, and not to the manner of its exercise and enjoyment. *Id.*

83. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

84. *Query*—whether a party, by erecting a mill and dam, becomes entitled to the water *in specie*, and whether he is entitled to anything more than the use of the water as a motive power—whether there may not be an appropriation of a mere use of the water as well as an appropriation of it as property for sale? *Ortman v. Dixon*, 13 Cal. 33.

85. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other purpose. *Id.*

86. If he suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right. *Id.*

87. *Query*: whether a water right, to pass the legal title from grantor to grantee, the premises being in adverse possession, must be conveyed by deed. *Id.*

88. No distinction can be drawn between a mill-owner and a miner, as to their rights in appropriating water. *Id.*

89. Possession of public land gives the right to the use of water flowing through it for natural wants; but does not confer the right to divert it, and prevent its running upon the adjoining land of another who has taken the same up subsequently; but before the attempt change the course of the water. *Crandall v. Woods*, 8 Cal. 136.

90. Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness in the use, is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Esmond v. Chew*, 15 Cal. 138.

91. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption, in its natural channel. *Bear River and Auburn W. and M. Co. v. York Mining Co.*, 8 Cal. 327.

92. But as to the deterioration in the quality of the water, by reason of being used for mining purposes, before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*. *Id.*

93. A notice of intention to appropriate the waters of a certain stream is evidence of possession; but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. *Thompson v. Lee*, 8 Cal. 275.

94. The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him, as well as below. *Hill v. King*, 8 Cal. 336.

95 **Tailings.**—Where tailings are allowed to flow upon the ground of another, he is entitled to them. *Jones v. Jackson*, 9 Cal. 237.

96. When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such grounds as may be necessary for this purpose; provided he does not interfere with preëxisting rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such, or as a mining claim. *Id.*

97. To suffer the tailings to flow where they list, without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary. *Id.*

98. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream, above and adjoining the claims of plaintiffs, defendants' claims being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs' claims, and through this flume a large quantity of the tailings was deposited on plaintiffs' claims, to their great damage. The flume was constructed for the purpose of working defendants' claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The Court instructed the jury, that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he could do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to claims subsequently located: *Held*, that the instruction was wrong; that defendant was not entitled, as matter of strict legal right, to an easement upon the plaintiffs' claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person may have a right of way by necessity over the land of another, does not apply to this case; and further, that this Court does not recognize the doctrine, that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by any local custom or regulation, its existence should have been averred and proved. *Esmond v. Chew*, 15 Cal. 138.

99. Miners locating claims subsequent to others, cannot throw their tailings on other parties' claims, as a matter of course; they must so use their property as not to interfere with prior rights. *Logan et al. v. Driscoll et al.*, 20 Cal.

100. **Quartz miners.**—The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bed rock, but is entitled to the loose quartz rock and decomposed material which were once a part of the lode, and are now detached, so far as the general formation of the ledge can be traced. *Brown v. '49 and '56 Quartz Mining Company*, 15 Cal. 152.

101. In cases of this kind, the custom of miners is entitled to great, if not controlling weight. *Id.*

102. The right of the quartz miner comes from his appropriation; and whenever his claim is defined, there is no reason in the nature of things, why the appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. *Id.*

103. So, where G. and McB. verbally agreed to prospect for quartz, and to be equally interested in claims taken up, and McB. discovered a lead or claim, and located it by putting up a written notice, with G's name and others on it, appropriating the lead: *Held*, that G's right attached by these proceedings, and could not be diverted by the mere act of McB. in taking down the notice, and putting up other notices with other names. *Gore v. McBrayer*, 18 Cal. 582.

104. The eleventh section of the Act of March, 1856, "for the protection of actual settlers, and to quiet land titles in this State," does not apply to miners engaged simply in extracting gold from quartz veins. *Fremont v. Seales*, 18 Cal. 433.

**105. Forfeiture: what is and is not.**—Where the regulations of a mining locality require that every claim shall be worked two days in every ten: *Held*, that the efforts of the owners of a claim to procure machinery for working the claim are, by fair intentment, to be considered as work done on the claim. *Packer et al. v. Heaton et al.*, 9 Cal. 568.

106. So, also, is working on adjoining land in constructing a drain to enable the owners to work the claim. *Id.*

107. Going on the lead to work it, or even work done in proximity, and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off, to run into the claim—would be a possession of the claim within the meaning of the rule. *English v. Johnson*, 17 Cal. 107.

108. In order to the enforcement of the forfeiture of the interest in the claim, some appropriate action by suit must be taken to liquidate the demand, and sell the property, or there must be at least clear and unequivocal proof of abandonment. *Waring v. Crow*, 11 Cal. 366.

109. In the absence of any custom or local regulation, the right of property, once attached in a mining claim, does not depend upon mere diligence in working such claim. The failure to comply with *any one* mining regulation, is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with *such* of them as make a noncompliance a cause of forfeiture. *McGarrity v. Byington et al.*, 12 Cal. 426.

110. Work done outside of a mining claim, with intent to work the claim, to be considered by intentment as work done on the claim, must have direct relation, and be in reasonable proximity to it. *Id.*

**111. Abandonment.**—The law will not presume an abandonment of property in a dam and ditch for mining purposes, from the lapse of time. *Partridge v. McKinney*, 10 Cal. 181.

112. Where a tenant in common, or partner, goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. *Waring v. Crow*, 11 Cal. 366.

113. Where the Court instructed the jury in such action, that “where an abandonment is sought to be established by the act of the party, the intention alone governs; and if such party leave a mining claim, with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years; provided, there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:” *Held*, that the question of abandonment was fairly left to the jury. *Id.*

## REMEDIES; ACTION ON THE CASE, NUISANCE, PLEADINGS AND PROCEEDINGS ON TRIAL.

**114. Complaint.**—See *ante*, p. 62, No. 148.

**115. Complaint for diversion of water.**—See *ante*, p. 74, Nos. 293–298.

116. Plaintiffs own mining claims called the “Columbus Claims;” defendants own claims called the “Dayton Claims,” on the west of plaintiffs’ claims. The boundary line between the claims is the point of dispute. Plaintiffs aver that defendants are working ground over the line and on plaintiffs’ claims, and bring trespass. Defendants deny—the pleadings being verified—that they are working on plaintiffs’ ground, and claim to own it; they also set up that they are owners of certain claims, known as the “Eureka Claims,” lying on the east of the Dayton Claims. Defendants, on the trial, offered to show that at the time of the alleged trespass, the “Eureka Company” owned the ground said to have been trespassed on, and that defendants had purchased it from the “Eureka Company” before this suit: *Held*, that the defendants were entitled to prove their title from the “Eureka Company”—plaintiffs objecting for irrelevancy—and that the title had not been pleaded. *Columbus Company v. Dayton Company*, 18 Cal. 615.

117. **Nuisance.**—Where a nuisance, by overflowing plaintiffs' mining claim by means of a dam erected by defendants was found, the decree should have ordered such a reduction of the dam as would have prevented any overflow, from that cause, of the plaintiffs' ground; or if necessary, an entire abandonment. And a perpetual injunction, to restrain the defendants from raising their dam higher than the point designated, was allowed. *Rawny v. Chandler*, 3 Cal. 90.

118. In an action for a nuisance, or trespass, the defendant has no right to inquire into the good faith of the plaintiffs' possession. *Eberhard v. Tuolumne W. Co.*, 4 Cal. 308.

119. A complaint alleging that plaintiffs had, for a long time, conveyed water from a stream for mining purposes, by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendant wrongfully diverted the same, and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne W. Co. v. Chapman*, 8 Cal. 392.

120. The allegation in the complaint that defendants wrongfully claim some pretended and fictitious right to the use of the water, does not prejudice the right of the plaintiffs. *Id.*

121. The diversion of a water course is a private nuisance. *Id.*

122. No equitable remedy can be had for a mere *past* diversion of a water course; but when the injury is *continuing*, relief may be appropriately sought in equity. *Id.*

123. There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. *Id.*

124. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Kelham*, 8 Cal. 77.

125. The line upon which a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owners date back to the survey. What is a reasonable time, must depend upon the circumstances of the case. *Id.*

126. Where a party stands by and sees a ditch owner appropriate the water of a creek to his own use at a great expense, and does not inform him of his claim to the water, he and his vendees are estopped from afterwards claiming the water. *Id.*

127. To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element. *Id.*

128. A ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Id.*

129. Where the plaintiff sued for an injury to his mining claim by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown, other than that which the law would presume from the breaking of the ditch: *Held*, that the rights of the parties were acquired at the dates of their respective locations; and that the rule of "coming to a nuisance" may be applied. *Tenney v. The Mining Ditch Co.*, 7 Cal. 335.

130. There is no doubt that the ditch owners would be responsible for wanton injury or gross negligence; but they are not liable for a mere accidental injury, where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch. *Id.*

131. A person has no right to construct a ditch through the inclosure of another without his consent. *Weimer v. Lowery*, 11 Cal. 104. See title "Nuisance," *ante* 316.

132. **Prayer of the complaint.**—When the prayer for damages is inserted in a complaint, in an action for the recovery of possession of a mining claim, it should be disregarded or stricken out, and the plaintiff allowed to try his right to the claim. *Van Elton v. Jilson*, 6 Cal. 19.

133. **Venue.**—Mining claims are real estate within the Practice Act, defining the venue of civil actions. *Watts v. White*, 13 Cal. 321.

134. **Injunction.**—See *ante*, 154, Nos. 30–44.

135. **Generally, Statute of Frauds does not apply to mining claims.**—The Statute of Frauds, requiring an instrument in writing to create an

interest in land, does not apply to the taking up of mining claims. A mere verbal authority to one man to take up a claim for another is sufficient. No title is divested out of the Government, but a right of entry given under it. *Gore v. McBrayer*, 18 Cal. 582.

136. **Mining claims, property in.**—In this State, claims to public mineral lands are recognized as titles—as legal estates of freehold, for all practical purposes—if we except some doctrine of abandonment not, perhaps, applicable to such estates. *Merritt v. Judd*, 14 Cal. 59.

137. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 9 Cal. 137.

138. The pay dirt and tailings of a miner, which are the products of his labor, are his property. *Jones v. Jackson*, 9 Cal. 237.

139. **Title of the miner.**—Under existing legislation, the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested by the exercise of the higher right of his superior proprietor. His right to protect the property for the time being is as full and perfect as if he were the tenant for years or for life of his superior proprietor. As his lease is of the mine, he is entitled to all the remedies for its protection that he could claim, if he were the owner, against all the world, except the true owner. *Merced Mining Co. v. Fremont*, 7 Cal. 317.

140. The possession of agricultural land is *prima facie* proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burage v. Smith*, 14 Cal. 380.

141. A writing is not necessary to vest or divest title on taking up a mining claim. The right of the miner comes from the mere appropriation of the claim made in accordance with the mining rules and customs of the vicinage. The title is in the Government; and the right to mine is, by its permission, to the appropriator. *Gore v. McBrayer*, 18 Cal. 582; *McGarrity v. Byington*, 12 Id. 426.

142. **How transferred.**—A bill of sale, not under seal, is insufficient to convey a mining claim. *McCarron v. O'Connell*, 7 Cal. 152.

143. A bill of sale for a mining claim, not under seal, and without a warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity. *Clark v. McElvy*, 11 Cal. 154.

144. We are unable to see why, upon questions as to the occupancy of public mineral land, a transfer of the right of the occupant to the possession—which is about all his claim to it—is not as good for all purposes to the vendee taking possession, when evidenced by an agreement, as by a deed. *Jackson v. Feather River Water Co.*, 14 Cal. 22.

145. **Rights of the vendee.**—The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Waring v. Crow*, 11 Cal. 366.

146. In such a case, the purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies to all such cases. *Clark v. McElvy*, 11 Cal. 154.

147. Where individuals convey lands, the minerals of gold and silver pass, unless expressly reserved. *Moore v. Smau* and *Fremont v. Flower*, 17 Cal. 199.

148. A patent from the United States for land in California, issued upon a confirmation of claims held under grants of the former Mexican Government, invests the patentee with the ownership of the precious metals which the land may contain. *Id.*

149. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J.'s contract: *Held*, that his claim is not subject or liable to J.'s contract. *Jenkins v. Redding*, 8 Cal. 589.

150. The possession of J. being that of his employer was not notice to the purchaser. *Id.*

151. **Partners and tenants in common.**—Whether associates in a mining claim are general partners, not decided; but if they are, still the rule qualifying the right of trustees and guardians as to purchasing from their *cestui que trust* and wards does not apply. *Bradbury v. Barnes*, 19 Cal. 120.

152. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring v. Crow*, 10 Cal. 366.

153. A tenant in common of a water ditch can maintain an action to recover his share of the rents and profits of his cotenants in possession and collecting the same. *Abel v. Love & Fowler*, 17 Cal. 233.

154. *Pico v. Columbet* (12 Cal. 240) has no application to the case of money received by one tenant in common from sales of water, or profits derived from the business of a ditch or mine. These operations may be regarded as partnerships in this respect; the shareholders are partners, being entitled to participate in the profits. *Id.*

§ 622. *A new trial may be granted in certain cases.*

A new trial may be granted by the Justice, on motion, within ten days after the entry of the judgment, for any one of the following causes:

1st. Accident or surprise, which ordinary prudence could not have guarded against;

2d. Excessive damages, appearing to have been given under the influence of passion;

3d. Insufficiency of the evidence to justify the verdict or other decision;

4th. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

§ 623. *Application for a new trial.*

The application shall be made upon affidavit and notice. The affidavit shall be filed with the Justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion, provided they be filed one day previous to the hearing of the motion.

§ 624. *Appeal from a judgment of a Justice may be taken to the County Court.*

[1853, 1854.] Any party dissatisfied with a judgment rendered in a Justice's Court may appeal therefrom to the County Court of the county [at] any time within thirty days after the rendition of the judgment. The appeal shall be taken by filing a notice of appeal with the Justice, and serving a copy on the adverse party. The notice shall state whether the appeal is taken from the whole or a

part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

See *ante*, §§ 366-367.

1. A notice of appeal from a Justice's to a County Court, stating that defendant appealed from the whole judgment, is a sufficient notice within the statute. *McDermott v. Douglass*, 5 Cal. 89.

2. On appeal from a Justice's to a County Court—the record not showing that notice of appeal had been served on the adverse party—appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 Cal. 368.

3. The general rule regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in Justices' Courts. *Welton v. Garibandi*, 6 Cal. 245.

4. A Justice of the Peace has jurisdiction to grant appeals and to stay proceedings thereupon; and his action cannot be reviewed on *certiorari*. *Coulter v. Stark*, 7 Cal. 245.

§ 625. *Party appealing on questions of law alone shall prepare a statement. Settlement of statement.*

[1853, 1854, 1855.] When a party appeals to the County Court on questions of law alone, he shall, within ten days from the rendition of the judgment, prepare a statement of the case, and file the same with the Justice. The statement shall contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments; the proposed statement and amendments shall be settled by the Justice; and if no amendments be filed, the original statement shall be adopted. The statement thus adopted, or as settled by the Justice, with a copy of the docket of the Justice, and all motions filed with him by the parties during the trial, and the notice of appeal, shall be used on the hearing of the appeal before the County Court.

1. On appeal from a Justice's Court to a County Court, on questions of law alone, if a new trial be ordered, it should take place in the County Court. *People v. Freelon*, 8 Cal. 518.

626. *If the appeal be upon questions of fact, or of law and fact, no statement need be made.*

[1853, 1854.] When a party appeals to the County Court on questions of fact, or on questions of law and fact, no statement need be made, but the action shall be tried anew in the County Court.



five days after the filing of the undertaking, and unless they or other sureties, justify before the Justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no undertaking had been given.\*

1. Superior Court of the City of San Francisco was abolished March 30th, 1857.

§ 629. *On filing undertaking, execution shall be stayed.*

If an execution be issued, on the filing of the undertaking staying all proceedings, the Justice shall, by order, direct the officer to stay all proceedings on the same. Such officer shall, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof, as may be necessary to pay the same.

1. A Justice of the Peace has jurisdiction to grant appeals, and to stay proceedings thereupon; and his action cannot be reviewed on certiorari. *Coulter v. Stark*, 7 Cal. 244.

§ 630. [1853, 1854.] *Repealed.*

§ 631. *Costs allowed to prevailing party.*

[1854, 1855.] Costs shall be allowed to the prevailing party in a Justice's Court.

§ 632. [1854, 1855.] *Repealed.*

§ 633. *Money collected by Constable or Sheriff shall be paid over to the Justice.*

Justices of the Peace shall receive from the Sheriff or Constables

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\* STATUTES OF 1856, 26.

*An Act Concerning Appeals in certain Cases.*

SECTION 1. When judgment has been rendered in the Court of a Justice of the Peace, in a County Court, a District Court, or the Superior Court of the City of San Francisco, against any organized or incorporated city or town in this State, said city, or town, or county, against which such judgment was rendered, may appeal therefrom to any Court of competent jurisdiction, by filing a notice of appeal with the said Justice of the Peace, or Clerk of either of the other Courts as above mentioned, and serving a copy thereof on the opposite party or his attorney, within the time and manner provided for appeals in other cases; and said appeals shall be effectual for all purposes, and shall operate as a supersedeas to any execution that has been or may be issued on said judgment, without the filing of a bond or the payment of costs to the Justice or other Courts, by the said city or town, or county so appealing.

SECTION 2. The Mayor, Attorney or Chief Officer of any city, or District Attorney, or the President of the Board of Supervisors of any county, shall have power to give the notice herein required to be given, and to perfect such appeal on behalf of their respective corporations or counties.

of their county, all moneys collected on any process or order issued by their Courts respectively, and all moneys paid to them in their official capacity, and shall pay the same over to the parties entitled or authorized to receive them, without delay. For a violation of this section, they may be removed from their office, and shall be deemed guilty of a misdemeanor.

§ 634. *Justice may require security for costs.*

Justices of the Peace may, in all cases, require a deposit of money, or an undertaking, as security for costs of Court, before issuing a summons.

§ 635. *Preceding sections applicable to Justices' Courts.*

[1860.] The provisions of sections thirty-two, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, three hundred and seventy-three, five hundred and nineteen, five hundred and twenty, five hundred and twenty-three, five hundred and twenty-five, five hundred and twenty-six, five hundred and twenty-seven, five hundred and thirty-one, five hundred and thirty-two, shall be applicable to Justices' Courts and actions therein.

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## TITLE XVII.

### PROCEEDINGS IN CIVIL CASES IN RECORDERS' AND MAYORS' COURTS.

SEC. 636. *Complaint, contents of. Must be verified.*

637. *Summons shall issue on filing complaint, returnable in not less than four days.*

638. *Defendant may plead orally or in writing.*

639. *Trial by jury, when defendant is entitled to.*

640. *Appeals may be taken to the County Court.*

641. *Proceedings shall be conducted as in actions in Justices' Courts.*

642. *This title applicable to Mayors' and Recorders' Courts.*

§ 636. *Complaint, contents of. Must be verified.*

Civil actions in Recorders' and Mayors' Courts shall be commenced by filing the complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation, as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint shall be verified by the oath of the party complaining, or of his attorney or agent.

§ 637. *Summons shall issue on filing complaint, returnable in not less than four days.*

Immediately after filing the complaint, a summons shall be issued, directed to the defendant, and returnable either immediately, or at any time designated therein, not exceeding four days from the date of its issuance.

§ 638. *Defendant may plead orally or in writing.*

On the return of the summons, the defendant may plead to the complaint, or he may answer or deny the same. Such plea, answer, or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown, an adjournment be granted.

§ 639. *Trial by jury, when defendant is entitled to.*

In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance, is less than fifty dollars, the trial shall be by the Court. In actions where the fine, forfeiture, or penalty imposed by the ordinance, is over fifty dollars, the defendant shall be entitled, if demanded by him, to a jury of six persons.

§ 640. *Appeals may be taken to the County Court.*

From a judgment in a civil action in a Recorder's or Mayor's Court, an appeal may be taken to the County Court. The appeal shall be taken and the proceedings thereon conducted in the same manner as appeals are taken from a judgment in a civil action in a Justice's Court, and as the proceedings thereon are conducted.

§ 641. *Proceedings shall be conducted as in Justices' Courts.*

All proceedings in civil actions in Recorders' and Mayors' Courts, except as herein otherwise provided, shall be conducted in the same manner as in civil actions in Justices' Courts.

§ 642. *This title applicable to Mayors' and Recorders' Courts.*

The provisions of this title shall be applicable to civil actions in Recorders' and Mayors' Courts already established, or which may hereafter be established in any incorporated city of this State.

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## TITLE XVIII.

### MISCELLANEOUS PROVISIONS.

SEC. 643. *Supreme Court may make rules for itself and District Courts.*

644. *County Clerk, what Courts Clerk of.*

645. *Actions against a Sheriff for official acts.*

646. *Actions may be prosecuted in the Spanish language in certain counties.*

647. *Use and definition of certain words as used in this Act.*

648. *Certain Acts repealed.*

649. *When this Act is to take effect.*

650. *Undertakings mentioned in this Act, requisites of.*

651. *Receivers in actions respecting mining claims.*

652. *Receivers, duties and compensation of.*

653. *Writs of certiorari and mandamus, who may issue. Hearing may be in vacation.*

654. *Property attached may be sold as under execution, if the interests of the parties require.*

655. *Certified copies of certain papers may be admitted in evidence.*

656. *Partners may be sued by their common name.*

657. *Decisions on appeal shall be given in writing.*

658. *Of disclaimer, before answer.*

- 659. *Intervention, who may make. Definition.*
- 660. *Intervention may be before or after issue joined.*
- 661. *Intervention, pleadings and proceedings upon.*
- 662. *Intervention, determination upon.*
- 663. *Testimony to be taken by the Clerk on request.*
- 664. *In case of adjournment, a party may have the testimony of any witness taken.*
- 665. *Executions for costs may issue on filing remittitur, or when costs are allowed by order of Court.*
- 666. *Repealing certain laws, and reviving others.*
- 667. *When supplementary Act to take effect.*

§ 643. *Supreme Court may make rules for itself and the District Courts.*

The Supreme Court may make rules not inconsistent with the Constitution and laws of the State, for its own Government, and the Government of the District Courts and the Superior Court of the City of San Francisco; but such rules shall not be in force until thirty days after their adoption and publication.

1. The Superior Court of the City of San Francisco abolished May 1st, 1857.

§ 644. *County Clerk, what Courts Clerk of.*

The County Clerk shall be the Clerk of the County Court, the Court of Sessions, and the Probate Court of his county. Until otherwise provided by law, the Clerk of the Superior Court of the City of San Francisco shall be appointed by the said Court.

§ 645. *Actions against a Sheriff for official acts.*

If an action be brought against a Sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the Court or Judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

§ 646. *Actions may be prosecuted in the Spanish language in certain counties.*

[1857, 1862.] In the counties of Monterey, San Luis Obispo,

Santa Barbara, Los Angeles and San Diego, it shall be the duty of the officer to give the defendant, in a civil action, if said defendant shall require it, a copy of the summons or other process in the Spanish language; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, San Diego, and Monterey, it shall be lawful, with the consent of both parties, to have the process, pleadings, and other proceedings in a cause, in the Spanish language.

§ 647. *Use and definition of certain words used in this Act.*

Words used in this Act in the present tense, shall be deemed to include the future as well as the present; words used in the singular number shall be deemed to include the plural, and the plural the singular; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or subscription to include mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name, as a witness.

§ 648. *Certain Acts repealed.*

The following statutes, namely: the Act entitled "An Act to Regulate Proceedings in Civil Cases in the District Court, the Superior Court of the city of San Francisco, and the Supreme Court," passed April twenty-second, eighteen hundred and fifty; the Act entitled "An Act to Regulate Proceedings against Debtors by Attachment," passed April twenty-second, eighteen hundred and fifty; the Act entitled "An Act providing for the Collection of Demands against Vessels and Boats," passed April tenth, eighteen hundred and fifty; the Act entitled "An Act to Regulate Proceedings in Courts of Justices of the Peace in Civil Cases," passed April tenth, eighteen hundred and fifty; and the Act entitled "An Act to Regulate Proceedings in the County Courts in Cases of Appeal from the Courts of Justices of the Peace," passed April eleventh, eighteen hundred and fifty; the Act entitled "An Act respecting Set-offs," passed [April] twenty-second, eighteen hundred and fifty, are hereby repealed; but such repeal shall not invalidate any judgment rendered, or order made, or any proceeding already taken by virtue of said statutes.

§ 654. *Property attached may be sold as under execution, if the interests of the parties require.*

[SEC. 66, 1854.] Whenever property has been taken by an officer under a writ of attachment, in pursuance of the provisions of said act, and it shall be made to appear satisfactorily to the Court, or a Judge thereof, or a County Judge, that the interest of the parties to the action will be subserved by a sale thereof, the Court or Judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the Court, to abide the judgment in the action. Such order shall be made only upon notice to the adverse party or his attorney, in case such party have been personally served with a summons in the action.

See §§ 130, 221.

§ 655. *Certified copies of certain papers may be admitted as evidence.*

[SEC. 67, 1854.] A copy of any record, document, or paper in custody of a public officer of this State, or of the United States, within this State, certified under the official seal, or verified by the oath of such officer, to be a true, full and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the Courts of this State, in the like manner and with the like effect, as the original could be if produced.

See §§ 448, 449.

1. A sworn copy or exemplification of instruments in the archives of the Government is evidence, and the originals ought not to be removed from the Government offices. *Gregory v. McPherson*, 13 Cal. 574.

2. A certified copy of a deed from the County Recorder's office, contained in the margin of the acknowledgment taken before a Notary, and in the place where his seal is usually found, the words "[No Seal]"—the conclusion of the acknowledgment being, "In witness whereof I have hereunto set my hand and affixed my official seal," etc. The Court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the Notary's seal: *Held*, that the Court erred; that the words "[No Seal]" instead of implying that there was no seal affixed, were a mere note by the Recorder of the place of the Notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

§ 656. *Partners may be sued by their common name.*

[SEC. 68, 1854.] When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being

which shall be filed with the Justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the Justice shall have power to issue a written order to any Sheriff or Constable, to put such receiver into possession of such claim, which order said Sheriff or Constable shall execute, and the receiver shall remain in possession of the claim or claims, so long as said action may remain undetermined in any Court. The Court in which the action may be pending, shall have authority, upon the application of either party, with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims, for the safety of the same, as may seem proper. The Court in which the action may be pending shall also have power, upon application of the receiver, based upon his affidavit, to punish as for contempt, all persons who have been guilty of disturbing the receiver in the possession of the claims.

See § 143 and notes.

§ 652. *Receivers, duties of.*

[SEC. 64, 1854.] The receiver mentioned in the last section shall keep an accurate account of all the proceeds of the claim pending action, and of all amounts paid out for working the same, and shall retain the proceeds, and pay the same over pursuant to the order of the Court. The receiver shall also be required, on demand of either party, to give security for the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands; but in no case exceeding ten per cent. upon such proceeds.

§ 653. *Writs of certiorari and mandamus, who may issue. Hearing may be in vacation.*

[SEC. 65, 1854.] Writs of *certiorari* and *mandamus* may be issued in the cases prescribed by said Act by a Judge of the Supreme Court, District Court, or County Court, in vacations, and may, in the discretion of the Judge issuing the writ, be made returnable, and a hearing may be had on the return thereof in vacation.



action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.

1. The sixteenth and seventeenth sections of the Practice Act, and the seventy-second, seventy-third and seventy-fourth sections of the amendments of 1854 to the Practice Act, give a party the right to intervene in an action in case of the transfer of any interest during the pendency thereof, or when he is directly interested in the subject matter in litigation, and this can be done either before or after issue has been joined in the case. *Brooks v. Hager*, 5 Cal. 281.

2. The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit or a claim to, or lien upon the property, or some part thereof, which is the subject of litigation. *Horn v. The Volcano Water Company*, 13 Cal. 62.

3. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. But judgment creditors, being as such subsequent incumbrancers, may intervene; and a Court may order them to be made parties, probably by an amendment of the complaint as the better course, or on petition of intervention. *Id.*

4. In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. *Id.*

5. In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 504; *Moses v. Warner*, 10 Id. 296; *Dillon v. Byrne*, 5 Id. 456.

6. In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment because void as to them. *Davis v. Eppinger*, 18 Cal. 378.

7. Subsequent attachment creditors may intervene in a suit of the prior attachment creditor and the common debtor, when they allege that there is nothing due to said first creditor, and that his object is to hinder, delay and defraud his creditors. *M. Speyer v. Ihmels & Co.*, Jan. 1862.

8. The intervenors become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the intervenors against him, and in his favor against the real defendants. *Id.*

9. A. & Co. having on general deposit with B. & Co. \$75,000, a tax for county purposes was levied thereon, and payment demanded of both A. & Co. and B. & Co.: *Held*, that the tax was legal, and that the county might intervene in an action concerning the money, to recover said tax. *Yuba Co. v. Adams*, 7 Cal. 37.

10. The petition of an intervenor must be treated as a declaration or complaint. *People v. Talmage*, 6 Cal. 256.

11. On intervention, if the proceedings between the debtor and a prior creditor are not void, but voidable, the defendant can alone object. *Dixey v. Pollock*, 8 Cal. 570.

12. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And, when the suit had been pending some time, and the application to intervene was made just as

plaintiff was taking judgment, the application was properly refused. *Hocker v. Kelley*, 14 Cal. 164.

13. The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit, during the existence of the lien, is the same as commencing an original action. *Marz v. McKay*, 14 Cal. 127.

14. It is too late on appeal to object that certain parties could not intervene in a suit pending in the inferior Court. *McKenty v. Gladwin*, 10 Cal. 227.

§ 660. *Intervention may be before or after issue joined.*

[SEC. 72, 1854.] A third person may intervene, either before or after issue has been joined in the cause.

§ 661. *Intervention, pleadings and proceedings upon.*

[SEC. 73, 1854.] The intervention shall be by petition or complaint, filed in the Court in which the action is pending, and it must set forth the grounds on which the intervention rests. A copy of the petition or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action.

§ 662. *Intervention, determination upon.*

[SEC. 74, 1854.] The Court shall determine upon the intervention at the same time that the action is decided; if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention.

§ 663. *Testimony to be taken by the Clerk on request.*

[SEC. 75, 1854.] On the trial of any action in a Court of Record, either party may require the Clerk to take down the testimony in writing.

1. A transcript of the testimony, if agreed to as correct, certified by the Clerk, is a substitute for a bill of exceptions or statement of facts in their absence. *Ingraham v. Gildemeester*, 2 Cal. 161; *Castro v. Amesti*, 14 Id. 38.

§ 664. *In case of an adjournment, a party may have the testimony of any witness taken.*

[SEC. 76, 1854.] The party obtaining a postponement of a trial in any Court of Record, shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a Judge or Clerk of the Court in which the case is pending, or before such

Notary Public as the Court may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witnesses were produced.

§ 665. *Executions for costs may issue on filing remittitur, or when costs are allowed by order of Court.*

[SEC. 77, 1854.] Whenever costs are awarded to a party by an Appellate Court, such party may have an execution for the same, on filing a remittitur with the Clerk of the Court below, and it shall be the duty of such Clerk, whenever the remittitur is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any Court, such party may have an execution therefor in like manner as upon a judgment.

1. When a remittitur is sent down, the Clerk of the District Court may issue execution for costs. *Mayor of Marysville v. Buchanan*, 3 Cal. 212.

2. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The Clerk below can issue execution for the damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

§ 666. *Repealing certain laws and revising others.*

[SEC. 78, 1854.] Sections five, six, seven, fifteen, sixteen, seventeen, eighteen, nineteen and twenty, of the Act entitled: "An Act Amendatory of and Supplementary to the Act entitled 'An Act to Regulate Proceedings in Civil Cases in the Courts of Justice in this State,'" passed May eighteenth, one thousand eight hundred and fifty-three, are hereby repealed, and the sections amended by said Amendatory Act shall stand revived as amended by this Act.

§ 667. *When supplementary Act to take effect.*

[SEC. 79, 1854.] This Act shall take effect on the first day of July, one thousand eight hundred and fifty-four.

# APPENDIX.

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## AN ACT

### CONCERNING THE COURTS OF JUSTICE OF THIS STATE, AND JUDICIAL OFFICERS.

[Passed May 19th, 1853.]

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*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

#### CHAPTER I.—*Courts of Justice in general.*

##### § 1. *Enumeration of the Courts of this State.*

The following shall be the Courts of Justice for this State: 1st, the Supreme Court; 2d, the District Courts; 3d, the County Courts; 4th, the Courts of Sessions; 5th, the Probate Courts; 6th, the Justices' Courts; 7th, the Recorders' Courts; 8th, the Mayors' Courts.

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#### CHAPTER II.—*The Supreme Court.*

##### SEC. 2. *Constitution of the Court and qualification of the Justices.*

3. *Election of the Justices, and their term of office.*
4. *Vacancy, how filled.*
5. *Jurisdiction of the Supreme Court.*
6. *Jurisdiction to review upon appeal.*
7. *May issue all writs necessary to the proper exercise of their powers.*
8. *Powers of the Supreme Court.*
9. *Terms of the Court.*
10. *Two Justices necessary to transact business or pronounce a judgment.*
11. *Place of holding the Court.*

§ 2. *Constitution of the Court and qualification of the Justices.*

The Supreme Court of this State shall consist of a Chief Justice and two Associate Justices. Each Justice hereafter elected or appointed, shall be commissioned by the Governor, and before entering upon his duties, shall take the constitutional oath of office.

§ 3. *Election of the Justices, and their term of office.*

The Justices of the Supreme Court shall be chosen at general elections by the qualified voters of the State. One of the Justices shall be chosen at the general election of the year one thousand eight hundred and fifty-three, and at the general election every second year thereafter, and shall hold his office for the term of six years from the first day of January next after his election. The senior Justice in commission shall be the Chief Justice.

§ 4. *Vacancy, how filled.*

When from any cause a vacancy shall occur in the office of a Justice of the Supreme Court, the Governor shall fill the same by granting a commission, which shall continue until the election and qualification of a Justice. A Justice to fill a vacancy shall be chosen at the first general election subsequent to the occurrence of the vacancy.

See *ante*, § 310.

1. The absence of a Judge from the State is not such a vacancy as can be supplied by the Executive under legislative authority. *People v. Wells*, 2 Cal. 610.

§ 5. *Jurisdiction of the Supreme Court.*

The Supreme Court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll or impost, or municipal fine is in question; and in all criminal cases amounting to felony, on questions of law alone.

1. The Supreme Court possesses appellate jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Conant v. Conant*, 10 Cal. 249.

2. The first clause of the fourth section of article six of the Constitution, which section provides that the Supreme Court shall have appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll or impost, or municipal fine is in question; and in all criminal cases amounting to felony, on questions of law alone, is construed to mean that the Supreme Court shall possess appellate jurisdiction in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value, or amount, two hundred dollars, unless a question of the legality of a tax, toll, impost, or municipal fine is drawn in question. *Id.*

3. The words "matter of dispute," in section four of article six of the Constitution, conferring jurisdiction on the Supreme Court, mean the subject of litigation—the matter for which suit is brought. *Dumphy and Hildrith v. Guindon*, 13 Cal. 28.

4. Costs of suit form no part of the matter in dispute. The appellate jurisdiction of this Court in cases of mere money demands, not involving the legality of any tax, toll, impost, or municipal fine, can be exercised only when the amount for which suit is brought exceeds two hundred dollars. *Id.*

5. In an action of damages, laid at two hundred dollars, defendant plead a general denial, and an offset of one hundred and twenty-five dollars: *Held*, that the Supreme Court has no jurisdiction, the amount in dispute being less than two hundred dollars; and that the fact that an offset was plead did not alter the case. *Simmons v. Brainard*, 14 Cal. 278.

6. No appeal will lie from a judgment for two hundred dollars, costs and per centage. The amount must exceed two hundred dollars—that is, the amount in dispute—costs and per centage are only incidental to the action. *Zabriskie v. Terry*, 20 Cal. 347.

7. Plaintiff has judgment against defendant for six hundred dollars. Defendant has judgment in the same Court, but in a different action, against plaintiff for one hundred and ten dollars, costs. Plaintiff moves to set off defendant's judgment, and apply the same as a credit upon plaintiff's judgment. Motion denied. Plaintiff appeals from the order denying the motion: *Held*, that the Supreme Court has no jurisdiction—the judgment sought to be set off being for less than two hundred dollars. *Crandall v. Blen*, 15 Cal. 406.

8. A District Court having, on *certiorari*, affirmed the judgment of a Justice's Court against relator for one hundred and sixty-four dollars, and fourteen dollars costs, relator appeals to the Supreme Court: *Held*, that the appeal must be dismissed for want of jurisdiction. *Morehouse v. Carman*, 18 Cal. 693.

9. Plaintiff sued for four hundred dollars and sixty dollars for goods sold and delivered. Defendants plead an offset, and had verdict and judgment for two hundred dollars, with forty-four dollars costs. Plaintiff appeals: *Held*, that the Supreme Court has jurisdiction; that the "amount in dispute," within section four, article six of the Constitution, is not determined, where plaintiff is appellant, by the amount of the offset pleaded by defendants or found by a jury: that in such case the amount claimed by the complaint, the action being for a debt or damages only, is to be considered in determining whether this Court has appellate jurisdiction in the case. *Gillespie v. Benson*, 18 Cal. 409.

10. The Court being created by the Constitution, and its powers being therein defined, the jurisdiction conferred by the Constitution must be taken as exclusive of all other jurisdiction. *The Attorney General, ex parte*, 1 Cal. 85.

11. The appellate jurisdiction of this Court does not extend over judgments of

inferior tribunals, from whence decisions no appellate jurisdiction has been conferred on this Court by the Legislature; and when a *certiorari* had been issued to a County Court, and a return was made, the proceedings were dismissed for want of jurisdiction. *White v. Lighthall*, 1 Cal. 347.

12. The Supreme Court will take judicial notice that the Fourth Judicial District is a district within and for the county of San Francisco. *People v. Robinson*, 17 Cal. 363.

13. The Supreme Court has no jurisdiction of a criminal case not amounting to a felony. *People v. Vick*, 7 Cal. 165; *People v. Cornell*, 16 Id. 188.

### § 6. *Jurisdiction to review upon appeal.*

[1854.] The Supreme Court shall have jurisdiction to review upon appeal:

1st. A judgment in an action or proceeding commenced in or removed from another Court to the District Courts, or County Courts, when the matter in dispute exceeds two hundred dollars; or when the possession or title of land or tenements is in controversy; or when the legality of any tax, toll or impost, or municipal fine is in question; and to review upon the appeal from such judgment any intermediate order or decision, involving the merits and necessarily affecting the judgment;

2d. An order granting or refusing a new trial; or refusing to change the place of trial of an action or proceeding, after a motion is made therefor in the cases provided by law; or on the ground that a Judge is disqualified from hearing or trying the same; or sustaining or overruling a demurrer; or affecting a substantial right in an action or proceeding.

See *ante*, §§ 336, 347, 359, 363, note \* 366.

### § 7. *May issue all writs necessary to the proper exercise of their powers.*

This Court, and each of the Justices thereof, shall have power to issue all writs necessary or proper to the complete exercise of the powers conferred by the Constitution, and by this and other statutes.

See *ante*, §§ 456, 467.

1. Supreme Court may issue a writ of error. 5 Cal. 190; 8 Id. 297.

### § 8. *Powers of the Supreme Court.*

[1854.] This Court may reverse, affirm or modify the judgment or order appealed from, as to any or all the parties, and may, if necessary or proper, order a new trial, or the place of trial to be changed; when the judgment or order is reversed or modified, this

Court may make complete restitution of all property and rights lost by the erroneous judgment or order.

1. See *ante*, § 345, titles "Restitution of Property and Rights;" "Effects of Reversal."

2. Also see *ante*, § 346, title "Dismissal of Appeal, and Effect of."

§ 9. *Terms of the Court.*

There shall be four terms of this Court in each year, to commence on the first Monday of January, April, July and October, and to continue until the fourth Saturday thereafter, inclusive, unless all the cases ready for hearing be sooner disposed of. If all the cases ready for hearing be not disposed of, the terms may be continued as much longer as in the opinion of the Court the public interest shall require.

§ 10. *Two Justices necessary to transact business or pronounce a judgment.*

[1854.] The presence of two Justices shall be necessary for the transaction of business, excepting such business as may be done at chambers; and the concurrence of two Justices who have been present at, and heard the arguments, shall be necessary to pronounce a judgment. If two who have been present at, and heard the argument, do not concur, the case shall be reheard.

§ 11. *Place of holding the Court.*

[1854.] The terms of this Court shall be held at the City of San Francisco, until otherwise provided for by law.\* If a room in which to hold the Court be not provided by the State, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the Court may direct the Sheriff of the county in which it is held to provide such room, attendants, fuel, lights and stationery, and the expense thereof shall be paid out of the State treasury.

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\* AN ACT TO FIX THE SESSIONS OF THE SUPREME COURT AT THE CAPITAL OF THE STATE.

[Passed March 24th, 1854.]

*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

SEC. 1. From and after the passage of this Act, the sessions of the Supreme Court shall be held at the capital of the State.



CHAPTER III.—*The District Courts.*SEC. 12. *Judicial Districts within this State enumerated.*

13. *A District Judge shall be in each District.*
14. *Election and term of office of District Judges.*
15. *Vacancies, how filled.*
16. *Qualification of District Judges.*
17. *Requisites to eligibility for District Judge.*
18. *Jurisdiction, original and appellate.*
19. *Original jurisdiction.*
20. *May try indictments, in certain cases.*
21. *Appellate jurisdiction.*
22. *May issue writs necessary to the proper exercise of their powers.*
23. *Place of holding District Courts.*
24. *Duration of their terms.*
25. *District Judges shall transact business at chambers.*
26. *Transfer of cases from the District to the County Court.*
27. *Temporary disability of the District Judge, who may hold terms during.*
28. *District Court may make rules for its government.*

§ 12. *Judicial Districts within this State enumerated.*

[1854, 1855, 1857.] The State shall be divided into fifteen judicial districts, which districts shall be numbered, and composed of the several counties and parts of counties, as follows:

1st. The First Judicial District shall be composed of the counties of San Diego, Los Angeles and San Bernardino;

2d. The Second Judicial District shall be composed of the counties of Santa Barbara and San Luis Obispo;

3d. The Third Judicial District shall be composed of the counties of Santa Cruz, Santa Clara, Monterey and Alameda;

4th. The Fourth Judicial District shall be composed of that part of the northern portion of the city and county of San Francisco lying north of a line described as follows: Commencing at the western boundary of said county, at a point in a line with the

center of Bush street, in said city, thence running easterly in a line with and through the center of Bush street, to the center of Larkin street; thence northerly along the center of Larkin street to the center of Pine street; thence easterly along the center of Pine street to the center of Kearny street; thence northerly along the center of Kearny street to a point in a line with the northern side of the City Hall or Court House; thence easterly to and along the northerly line of the City Hall or Court House, to a point sixty-five feet from the easterly line of Kearny street; thence at right angles southerly to the southern line of said hall or Court House; thence westerly along the southern line of said building to the easterly line of Kearny street; thence southerly along said eastern line of Kearny street to the center of Clay street; thence easterly along the center of Clay street to a point in the eastern boundary line of said county;

5th. The Fifth Judicial District shall be composed of the counties of Calaveras, Amador, Tuolumne and San Joaquin;

6th. The Sixth Judicial District shall be composed of the county of Sacramento;

7th. The Seventh Judicial District shall be composed of the counties of Marin, Sonoma, Mendocino, Napa, Solano and Contra Costa;

8th. The Eighth Judicial District shall be composed of the counties of Humboldt, Klamath and Del Norte;

9th. The Ninth Judicial District shall be composed of the counties of Shasta, Siskiyou and Trinity;

10th. The Tenth Judicial District shall be composed of the counties of Yuba and Sutter;

11th. The Eleventh Judicial District shall be composed of the counties of El Dorado, Placer and Yolo;

12th. The Twelfth Judicial District shall be composed of that portion of the city and county of San Francisco which is not included within the limits of the Fourth Judicial District, as above described, and of the county of San Mateo;

13th. The Thirteenth Judicial District shall be composed of the counties of Mariposa, Tulare, Fresno, Merced and Stanislaus;

14th. The Fourteenth Judicial District shall be composed of the counties of Sierra and Nevada;

15th. The Fifteenth Judicial District shall be composed of the counties of Plumas, Butte, Colusa and Tehama.\*

§ 13. *A District Judge shall be in each district.*

There shall be a District Judge for each of the Judicial Districts. The Courts held by them shall be the District Courts of this State.

§ 14. *Their election and term of office.*

[1860.] The District Judges shall be chosen by the qualified electors of their respective districts, at the general elections, and shall enter upon the duties of their office on the first of January subsequent to their election, and shall hold office for the term of six years.

§ 15. *Vacancies, how filled.*

[1860.] In case of a vacancy in the office of District Judge, the Governor shall fill the same by granting a commission, which shall continue until the election and qualification of a Judge in his place. At the first general election subsequent to the occurrence of the vacancy, a Judge shall be elected who shall qualify and enter upon the duties of his office on the first day of January subsequent to his election, and shall hold his office for the term of six years.

§ 16. *Qualification of District Judges.*

Each District Judge hereafter elected or appointed shall be commissioned by the Governor, and before entering upon his duties, shall take the constitutional oath of office.

§ 17. *Requisites to eligibility for District Judge.*

[1855, 1859.] Each Judge shall reside in his district, except that the Judges of the Fourth and Twelfth Judicial Districts may reside in any part of the county of San Francisco, and no person shall be eligible to the office of District Judge who shall not have

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\*This section has been amended, although not by express terms, in the following particulars:—The county of Contra Costa has been taken from the Seventh and added to the Fourth Judicial District, by an Act passed the twenty-seventh of March, 1862. (See Statutes of 1862, 97.)

The Fifth, Fourteenth and Fifteenth Judicial Districts have been divided, and the Sixteenth and Seventeenth Judicial Districts created. (See Statutes of 1860, 2.)

been a citizen of the United States and a resident of this State for two years, and of the district six months, previous to his election. But a residence in any part of the city and county of San Francisco shall be deemed a residence within the Fourth or Twelfth Judicial Districts, within the meaning of the last clause of this section.

§ 18. *Jurisdiction, original and appellate.*

The jurisdiction of these Courts shall be of two kinds:

1st. Original;

2d. Appellate.

1. Appellate jurisdiction unconstitutional. 5 Cal. 52.

2. District Courts are Courts of general jurisdiction, and the regularity of their proceedings is presumed. It rests with a party seeking to impeach them to show affirmatively the irregularity, or acts, or omissions which affect the validity of their judgments—especially after the jurisdiction of the person is once shown. *People v. Robinson*, 17 Cal. 363.

3. Where the principal sum sued for is less than two hundred dollars, the District Court has not jurisdiction. *Arnold v. Van Brunt*, 4 Cal. 89.

4. Where suit was brought in the District Court, on an undertaking on appeal to the Supreme Court, given in the sum of three hundred dollars, conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the Supreme Court, and the damages and costs so awarded were only thirty dollars and fifteen cents: *Held*, that the District Court had no jurisdiction. *Page v. Ellis*, 9 Cal. 248.

5. The fact that the sum sued for in such case was only two hundred dollars, does not deprive the District Court of jurisdiction. The fact that the title to real property was involved, and not the sum sued for, established the jurisdiction. The issue upon this question of title had first to be found in favor of plaintiff, before he could recover any damages. This issue involved, not only the right of plaintiff to recover, but the entire value of the property; and there being nothing in the record to show this value to be insufficient to support the jurisdiction, the presumptions are in favor of the validity of the proceedings. *Cullen v. Langridge*, 17 Cal. 67.

6. The District Courts of this State have the same control over the persons of minors, as well as their estates, that the Courts of Chancery in England possess. This jurisdiction is conferred by the Constitution, and cannot be divested by any legislative enactment. *Reed v. McCormick*, 4 Cal. 342.

7. The sixth section of article sixth of the Constitution, which provides that in all issues of fact joined in Probate Courts, the jurisdiction of the District Courts shall be unlimited, does not give the District Court appellate jurisdiction from the Probate Courts. *Id.*

8. The jurisdiction of the Fourth District Court, in the county of San Francisco, continues the same as it was previous to the creation of the Twelfth Judicial District. The jurisdiction of the Fourth District Court and of the Twelfth District Court, within the limits of the city of San Francisco, is equally extensive, and the proceedings may be commenced in either Court at the option of the suitor. *Slade v. His Creditors*, 10 Cal. 483.

9. The District Court, by virtue of its common law powers alone, derives its power to try issues of fact, and that Court as a Court of law has no jurisdiction over probate matters. Its jurisdiction over matters of account, and the like, is derived from its grant of equitable power in the Constitution, and in that respect it has only concurrent jurisdiction with the Probate Court. *Pond v. Pond*, 10 Cal. 495.

10. Issues of fact are sent from the Probate Court to the District Court, not as

from an inferior to a superior tribunal, but for the sake of convenience, because the Probate Court has not the machinery of jury trial and its incidents. But it was never intended to transfer any portion of the jurisdiction of Probate Courts to the District Courts. Nor was it designed, by the Act of 1855, directing these issues, to make the judgments of the District Courts binding upon the Courts of Probate. *Id.*

11. The nonpresentation of a claim against the estate of a deceased person to the administrator, will not deprive the District Court of jurisdiction over such claim. *Hentsch v. Porter*, 10 Cal. 555.

12. Under former decisions of this Court, the District Courts, as Courts of Chancery, have assumed the jurisdiction over probate matters, and as, probably, rights have vested under their decrees, and the principle asserted is more convenient in practice, it is not permissible now to question the jurisdiction. *Deck v. Gerke*, 12 Cal. 433.

13. The District Court may take jurisdiction of the settlement of an estate, when there are peculiar circumstances of embarrassment to its administration, and when the assuming jurisdiction would prevent waste, delay and expense, and thus conclude, by one action and decree, a protracted and vexatious litigation. *Id.*

14. The Superior Court not having jurisdiction, the Fourth District Court taking the case, by operation of law, from the former Court, possessed no greater powers in the case than the Superior Court. *Watts v. White*, 13 Cal. 321.

15. The Fourth District Court, although the district only comprises a portion of the County of San Francisco, is a Court for the whole county, having jurisdiction over persons and subject matter therein. The territorial limits assigned to this Court are given for the purposes of convenience in elections, etc., and not for the purpose of limiting its powers. *People v. Robinson*, 17 Cal. 363.

16. Under the Constitution, the District Courts of the State have jurisdiction in cases of nuisance. The grant, by the Legislature, of jurisdiction in such cases to the County Courts, cannot take away the jurisdiction given to the District Courts by the Constitution. *Fitzgerald v. Urton et al.*, 4 Cal. 235.

17. The Act of the Legislature, by which a District Judge of one district is empowered to hold a District Court in another district, is constitutional and valid; and a Court held in pursuance of such act by a District Judge in a district other than the one for which he was elected is not, for that reason, improperly organized. *The People v. McCauley*, 1 Cal. 379.

18. The Clerk of the Court has power to issue a *venditioni exponas* at common law, or under the statute "To Regulate Proceedings in the District Courts," of 1850, p. 24, which authorizes the Court to frame new writs and process, and to issue such executions and other writs as may be necessary to carry their judgments into full force and effect. *Smith v. Marsh*, 2 Cal. 524.

### § 19. *Original jurisdiction.*

Their original jurisdiction shall extend to all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest, and to all criminal cases not otherwise provided for. In cases involving the title or possession of real property, and in all issues of fact joined in the Probate Court, their jurisdiction shall be unlimited.

### § 20. *May try indictments in certain cases.*

In all the counties of this State, the District Courts shall have jurisdiction to try and determine all indictments transmitted to them from the Court of Sessions, in the cases provided for by law.

§ 21. *Appellate jurisdiction.*

[1854.] The appellate jurisdiction of these Courts shall extend to hearing upon appeal:

1st. A judgment of a Court of Sessions in a criminal action;

2d. A judgment of a Court of Sessions, rendered on appeal from Justices', Mayors', or Recorders' Courts, in a criminal action;

3d. An order or judgment of a Probate Court, in the cases prescribed by statute.

See *ante*, § 318.

§ 22. *May issue writs necessary to the proper exercise of their powers.*

These Courts, and the Judges thereof, shall have power to issue all writs necessary or proper to the complete exercise of the power conferred upon them by the Constitution, and by this and other statutes.

§ 23. *Place of holding District Courts.*

The terms shall be held at the county seats of the several counties; if a room for holding the Court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the Court may direct the Sheriff to provide such room, attendants, fuel, lights and stationery, and the expenses thereof shall be a county charge.

§ 24. *Duration of their terms.*

The terms shall be held until the business of the term is fully disposed of, or until the day fixed for the commencement of some other term in the district, and may be adjourned from time to time, in the discretion of the Court.

§ 25. *District Judges shall transact business at chambers.*

[1858, 1862.] The District Judges shall, at all reasonable times, when not engaged in holding Courts, transact such business at chambers as may be done out of Court. At chambers they may try and determine writs of *mandamus*, *certiorari*, *quo warranto*, hear and dispose of motions for new trials, and for all applications for orders and writs which are usually granted, in the first instance,

upon *ex parte* application, and may also, in their discretion, hear and [determine] deliver applications to discharge such orders and writs; they may also hear and determine application for writs of assistance, at chambers.

§ 26. *Transfer of cases from the District to the County Court.*

[1854.] Whenever an action or proceeding is commenced in a District Court, in which a County Court has concurrent jurisdiction, the District Court may, if the parties consent, by order, transfer the same to the County Court of the same county; upon such transference, the County Court shall have and exercise over such action or proceeding the same jurisdiction as if originally commenced therein.

§ 27. *Temporary disability of the District Judge, who may hold terms during.*

A District judge may hold a term in any Judicial District in this State, upon the request of the Judge of the District in which such term is to be held; and when, by reason of sickness or absence from the State, or from any other cause, a term cannot be held in a district by the Judge thereof, a certificate of that fact shall be transmitted by the Clerk to the Governor, who shall thereupon direct some other District Judge to hold such term. It shall be the duty of the Judge thus directed to hold such term.

§ 28. *District Courts may make rules for their government.*

Each District Court shall have power to make rules, not inconsistent with the Constitution and laws of this State, for its own government and the government of its officers, but such rules shall not be in force until thirty days after their adoption and publication, and no rule shall be made imposing any tax or charge upon any legal proceeding, or making an allowance to any officer for services.

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CHAPTER IV.—*The Superior Court of the City of San Francisco.*

[Sections twenty-nine to thirty-nine, inclusive, organizing the Superior Court of the City of San Francisco, were repealed by an Act passed March 30th, 1857.]

See Statutes of 1857, 128.

1. The late Superior Court of San Francisco had no jurisdiction of a suit affecting real estate situated outside the city limits. If this point arose on the complaint, it would be fatal. And probably, if the fact that the property was beyond the city appeared anywhere in the record, it would be fatal. *Watts v. White*, 13 Cal. 321.

2. The Superior Court of San Francisco had jurisdiction of a suit to settle the accounts of a partnership formed for the purchase of mining claims, where both parties resided in said city; but could not by its decree affect the title to, or any interest in, the claims themselves. *Id.*

3. The late Superior Court had power to send a summons for service out of the City of San Francisco. *Chipman v. Bowman*, 14 Cal. 157.

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### CHAPTER V.—*The County Courts.*

SEC. 40. *A County Court shall be in each county.*

41. *County Judge, election and qualification.*

42. *Vacancy, how filled.*

43. *Appellate jurisdiction of the County Courts.*

44. *Original jurisdiction.*

45. *Additional powers.*

46. *Terms of County Court.*

47. *Place of holding Court.*

§ 40. *A County Court shall be in each county.*

There shall be in each of the counties of this State a County Court, with the jurisdiction conferred by this chapter.

§ 41. *County Judge, election and qualification.*

The County Judge of each county shall be the Judge of the County Court. The County Judge of each county shall, except in the cases otherwise provided by special statutes, be chosen by the electors of the county, at the general election in the year one thousand eight hundred and fifty-three, and every four years thereafter, and shall enter upon the duties of his office on the first Monday of April subsequent to his election. Before entering upon his duties he shall take the constitutional oath of office.

1. It is not competent for the Legislature to change the period of the tenure of the office of the Judges of County Courts, any more than to change those of Supreme and District Judges. *People v. Templeton*, 12 Cal. 401; *People v. Rosborough*, 14 Cal. 187.

§ 42. *Vacancy, how filled.*

In case of a vacancy in the office of County Judge, the vacancy



shall be filled by appointment from the Governor until the next general election, when a County Judge shall be chosen for the unexpired term of the preceding Judge, and until the new Judge elected be qualified.

1. An election which was ordered by the Board of Supervisors to fill a vacancy in the office of County Judge, without proclamation of the Governor, is invalid, and the office being vacant, can be properly filled by appointment of the Governor. *People v. Porter*, 6 Cal. 28; *People v. Martin*, 12 Cal. 411.

2. The appointee of the Governor to the office of County Judge will hold over a person elected to the same office at a special election ordered by the Board of Supervisors of the county. *People v. Martin*, 12 Cal. 411.

### § 43. Appellate jurisdiction of County Courts.

The County Court shall have jurisdiction to hear and determine all civil causes appealed thereto from a Justice's, Mayor's, or Recorder's Court, in the county.

1. The County Court has the sole appellate jurisdiction, in all cases, civil and criminal, arising in Justices' Courts, subject to such restrictions as the Legislature may impose by making the decisions of the Justice final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 88.

2. The County Court on appeal should proceed to try the case on its merits anew, and not dismiss the same if defendant had no notice of trial in the Justice's Court. *Colye v. Baldwin*, 5 Cal. 75.

### § 44. Original jurisdiction.

The County Court shall have original civil jurisdiction:

- 1st. Of an action to enforce the lien of mechanics and others;
- 2d. Of an action to prevent or abate a nuisance;
- 3d. Of all proceedings against ships, vessel or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages, for a voyage performed in whole or in part without the waters of this State;
- 4th. Of proceedings in cases of insolvency.

1. An act conferring jurisdiction on the County Courts, in actions for which Courts of general jurisdiction have always supplied a remedy, as "special cases," is unconstitutional and void. *Parsons v. Tuolumne W. Co.*, 5 Cal. 44.

2. Where parties stipulate to arbitrate, and that the award be entered as a judgment of the County Court: *Held*, that it was void in toto, if it exceeded two hundred dollars, as the Court had no jurisdiction. *Williams v. Walton*, 9 Cal. 145.

3. A County Court has no jurisdiction to enforce a mechanic's lien, when the amount in controversy exceeds two hundred dollars. *Brook v. Bruce*, 5 Cal. 280.

4. The District Courts have constitutional jurisdiction of cases of nuisance. The grant of such to the County Court by statute, cannot take away the constitutional jurisdiction of the District Court. *Fitzgerald v. Urton*, 4 Cal. 238.

5. In conferring the jurisdiction of actions to prevent or abate nuisances upon the County Courts, the Legislature exceeded its constitutional authority, and the portion of the act which contained it is invalid. *Parsons v. Tuolumne W. Co.*, 5 Cal. 43.

6. The Legislature, in conferring jurisdiction in insolvency cases upon both the District and the County Courts, acted in the exercise of a legitimate power, and the Courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

§ 45. *Additional powers.*

The County Court and the Judge thereof shall have power, at chambers, to try and determine writs of *mandamus*, *certiorari* and *quo warranto*, and to issue all writs necessary or proper to the complete exercise of the powers conferred upon it by this and other statutes.

§ 46. *Terms of County Court.*

This Court shall hold a term on the first Monday of January, March, May, July, September and November, of each year, which shall continue until all the business of the Court be disposed of.

§ 47. *Place of holding Court.*

If a room for holding the Court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the Court may direct the Sheriff to procure such room, attendants, fuel, lights and stationery, and the expenses thereof shall be a county charge.

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CHAPTER VI.—*The Courts of Sessions.*

SEC. 48. *A Court of Sessions shall be in each county.*

49. *Constitution of the Court.*

50. *Election of Associate Justices.*

51. *Vacancy in the office of Associate Justice, how filled.*

52. *Jurisdiction of the Court of Sessions.*

53. *Indictments for certain offenses shall be transmitted to the District Court.*

54. *Indictments shall also be transferred for cause.*

55. *Additional powers and jurisdiction.*

56. *Jurisdiction of bays, streams, etc., which separate two counties.*

57. *Preservation of papers relating to business of the county.*

58. *Record of county business shall be kept distinct.*

59. *Terms of the Court of Sessions.*

60. *Place of holding the Court.*

§ 48. *A Court of Sessions shall be in each county.*

There shall be in each of the counties of this State, a Court denominated a Court of Sessions, with the jurisdiction conferred by this chapter.

§ 49. *Constitution of the Court.*

The Court of Sessions of each county shall be composed of the County Judge, who shall be the presiding Judge thereof, and two Justices of the Peace of the County, as Associate Justices.

1. The County Judge and two Associate Justices compose the Court of Sessions, and the presence of all three is necessary to the transaction of any business. *People v. Ah Chung*, 5 Cal. 105; *People v. Barbour*, 9 Cal. 234.

2. It is irregular for one of the Justices composing the Court of Sessions on a criminal trial to retire before the termination of the trial, and another Justice, not present during the previous stages of it, to come in and participate in the proceedings. The members of the Court who act as such when the case is developed, should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, is not here decided; but the practice is dangerous and disapproved of. *People v. Eckert*, 16 Cal. 113.

§ 50. *Election of Associate Justices.*

The Associate Justices of the Court of Sessions shall be chosen by the Justices of the Peace of the county. The County Judge shall convene, at the County Seat, on the first Monday of the month subsequent to the general election in each year, the persons elected as Justices of the Peace of the county at said preceding general election, and they, after being qualified and filing their respective bonds as such Justices, as required by law, shall elect, by ballot, two of their number as Associate Justices of the Court of Sessions. The County Judge shall preside over the convention, and the County Clerk shall be its Clerk. A majority of the persons who have qualified and filed their bonds as Justices of the Peace of the county, shall form a quorum for the purpose of the election. A minute of the proceedings of the convention shall be entered in the records of the Courts of Sessions. A certificate of election shall be given by the County Judge and Clerk, under the seal of the Court of Sessions, to the two persons who receive a majority of all the votes cast. Should there be no election for

Associate Justices held at the time above prescribed, the County Judge shall at any time be authorized to call an election for such purpose, by giving ten days' notice thereof.

1. On an election by Justices of the Peace for Associate Justices of the Court of Sessions, the County Judge and Clerk are *ex officio* officers of this convention; but they have no authority other than that of presiding over and recording its proceedings, and the dissolution of the convention by the County Judge is illegal. *People v. Campbell*, 2 Cal. 137.

2. When the Justices of the Peace fail to elect from their number Associate Justices of the Court of Sessions, on the first Monday in October, the County Judge may appoint Associates for the term; but the Justices may convene at a subsequent time and elect Associates. *Id.*

3. Where the Convention of Justices of the Peace for electing two Associate Justices of the Court of Sessions was presided over by the acting County Judge, his official acts at such convention were legal and valid—although it was afterwards determined that another person had been legally elected to that office; and a Court of Sessions composed of said other person as County Judge and of the two Associates elected by such convention, was legally organized. *People v. Wyman*, 15 Cal. 74.

§ 51. *Vacancy in the office of Associate Justices, how filled.*

If the Justices of the Court of Sessions, or either of them, be absent at a term of a Court of Sessions, or the office of those Justices, or either of them, be vacant, the County Judge shall supply the vacancy or deficiency for the term, by designating the requisite number to form the Court from the Justices of the Peace of the County.

§ 52. *Jurisdiction of the Court of Sessions.*

[1854, 1860.] The Courts of Sessions shall have jurisdiction:

1st. To inquire, by the intervention of a Grand Jury, of all public offenses committed or triable in their respective counties;

2d. To try and determine all indictments found therein, for all public offenses, except murder, manslaughter, fighting a duel and killing or wounding any person therein, and arson;

3d. To hear and determine appeals from Justices', Mayors' and Recorders' Courts, in cases of a criminal nature.

1. The Court of Sessions has no appellate jurisdiction in either civil or criminal cases. Its jurisdiction is only original. *People v. Fowler*, 9 Cal. 97.

§ 53. *Indictments for certain offenses shall be transmitted to the District Court.*

[1854, 1860.] When an indictment is found in the Court of Sessions for murder, manslaughter, fighting a duel and killing or

wounding any person therein, or arson, it shall be transmitted by the Clerk to the District Court sitting in the county for trial; except when the indictment is found against a person holding the office of District Judge, when it shall be transmitted to the District Court of such other district as the Court of Sessions may direct.

1. The Legislature possessed the undoubted right to transfer the criminal business of the Court of Sessions to the District Court. *People v. Gilmore*, 5 Cal. 380.

§ 54. *Indictments shall also be transferred for cause.*

[1854.] Indictments found in the Court of Sessions shall be transmitted to the District Court sitting in the county, for trial in the following cases:

1st. Whenever a Judge or Justice of the Court of Sessions is by law disqualified from hearing or trying the same;

2d. Indictments found against a member of the Court of Sessions, or any Justice of the Peace of the county.

§ 55. *Additional powers and jurisdiction.*

The Court of Sessions, except in the counties in which a Board of Supervisors is established, shall also have power and jurisdiction in its county:

1st. To make orders respecting the property of the county, in conformity with any law of this State, and to take care of and preserve such property;

2d. To examine, settle and allow all accounts legally chargeable against the county, and to direct the levying such per centage on the assessed value of real and personal property in the county as may be authorized by law;

3d. To examine and audit the accounts of all officers having the care, management, collection and disbursement of any money belonging to the county, or appropriated by law or otherwise for its use and benefit;

4th. To control and manage public roads, turnpikes, ferries, canals and bridges within the county, where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect;

5th. To divide the county into townships, and to create new townships, and to change the divisions of the same, as the convenience of the county may require;

6th. To establish and change election precincts ;

7th. To control and manage the property, real and personal, belonging to the county, and to receive by donation any property for the use and benefit of the county ;

8th. To purchase any real and personal property necessary for the use of the county ; provided, the value of such real property be previously estimated by three disinterested persons, to be appointed for that purpose by the District Court of the county ;

9th. To sell and cause to be conveyed any property belonging to the county, appropriating the proceeds of such sale to the use of the same ;

10th. To cause to be erected and furnished a court-house, jail, and such other public buildings as may be necessary, and the same to be kept in repair ; provided, that the erection of such court-house, jail, and other public buildings be let out, after one month's previous publication, in each case, of a readiness to receive proposals therefor, to the lowest bidder, who will give good and sufficient security for the completion of any contract which may be made respecting the same ;

11th. To ascertain and determine with a jury, or by consent of parties without a jury, the just compensation to be made to the owners of private property taken for public use ;

12th. To do and perform all such other acts and things as may be requisite and necessary to the full discharge of the powers and jurisdiction conferred on the Court.

1. All other than judicial functions conferred upon the Courts of Sessions or its officers, are unconstitutional and void. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 20 ; *Phelan v. Supervisors of San Francisco County*, 6 Id. 540 ; *Hardenburgh v. Kidd*, 10 Id. 403.

2. The powers conferred on the Court of Sessions by this section were conferred on the Boards of Supervisors of the several counties by Act of the Legislature, passed March 20th, 1855.

§ 56. *Jurisdiction of bays, streams, etc., which separate two counties.*

When any bay, river, stream, creek or slough separates two counties, the Court of Sessions of the county lying on the left bank descending such bay, river, stream, creek or slough, shall have the jurisdiction of the same, so far as the control and management of bridges and ferries are concerned, but all sums paid for licenses to construct any bridges, or to run any ferries over such river, stream, creek, or slough, shall be divided equally between the two counties.

§ 57. *Preservation of papers relating to business of the county.*

All accounts, vouchers, papers, petitions and documents relating to the business or property of the county, shall be appropriately arranged under their several heads, filed in the office of the County Clerk, and preserved separate from the papers and documents of the Court, as a Court having criminal jurisdiction.

§ 58. *Records of county business shall be kept distinct.*

The orders, judgments and proceedings of the Court, when sitting for the transaction of county business, shall be entered by the Clerk in separate books to be kept for that purpose.

§ 59. *Terms of the Court of Sessions.*

[1854, 1855.] A term of the Court of Sessions shall be held at the county seat in each county on the first Monday of February, April, June, August, October and December of each year, excepting the Court of Sessions in and for the county of Calaveras shall be held on the second Monday of January, March, May, July, September and November, and excepting also the county of Placer, where the terms of said Court shall be held on the second Monday of February, May, August and November in each year, and shall continue until the commencement of the next term, unless all the business of the Court be sooner disposed of. Special terms of the Court may also be held whenever, in the opinion of the County Judge, the public interests require the same.

1. An indictment for grand larceny found at a special term of the Court of Sessions is valid. Under the statute authorizing that Court to hold special terms in certain cases, the Court, when specially called, has the same powers as at a regular term. *People v. Carabin*, 14 Cal. 439.

§ 60. *Place of holding the Court.*

Until a court-house be erected for the county, this Court may direct the Sheriff to furnish a suitable room for holding the Court, and the expenses thereof shall be a county charge. This Court may, also, at any time, direct the Sheriff to furnish attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, and the expenses thereof shall be a county charge.

CHAPTER VII.—*The Probate Court.*

SEC. 61. *Probate Court shall be in each county.*

62. *Judge of Probate Court.*

63. *Jurisdiction of Probate Court.*

64. *Powers of County Judge as Judge of Probate Court in vacation.*

§ 61. *Probate Court shall be in each county.*

There shall be in each county a Probate Court, with the jurisdiction conferred by this chapter.

1. The jurisdiction of the Probate Court over testamentary and probate matters is not exclusive. Most of its general powers belong peculiarly and originally to the Court of Chancery, which still retains its jurisdiction. *Deck et al. v. Gerke et al.*, 12 Cal. 433.

See Belknap's Probate Practice, pp. 21-24.

§ 62. *Judge of the Probate Court.*

The County Judge of each county shall be the Judge of the Probate Court.

§ 63. *Jurisdiction of Probate Court.*

The Probate Court shall have power to open and receive the proof of last wills and testaments, and to admit them to probate; to grant letters testamentary, of administration and of guardianship, and to revoke the same for cause shown according to law; to compel executors, administrators and guardians to render an account when required, or at the period fixed by law; to order the sale of property of estates or belonging to minors; to order the payment of debts due by estates; to order and regulate all partitions of property or estate of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title deeds, papers, or other property of an estate or of a minor; and to make such other orders as may be necessary and proper, in the exercise of the jurisdiction conferred upon the Probate Court.

§ 64. *Powers of County Judge as Judge of Probate Court in vacation.*

The County Judge shall have power in vacation to appoint



appraisers to receive inventories and accounts to be filed in his Court; to suspend the powers of executors, administrators, or guardians in the cases allowed by law; to grant special letters of administration or guardianship; to approve claims and bonds, and to direct the issuance, from his Court, of all writs and process necessary in the exercise of his powers as Probate Judge.

§ 65. *Repealed.\**

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CHAPTER VIII.—*Justices' Courts.*

SEC. 66. *Denomination of Courts held by Justices of the Peace.*

67. *Jurisdiction of Justices' Courts.*

68. *Exceptions to jurisdiction.*

69. *Shall also have jurisdiction of certain public offenses.*

70. *Justices' Courts shall be always open.*

71. *Term, election and qualification of Justices.*

§ 66. *Denomination of Courts held by Justices of the Peace.*

The Courts held by Justices of the Peace in this State shall be denominated Justices' Courts, and shall have the jurisdiction conferred by this chapter; but nothing contained in this chapter shall affect their jurisdiction in actions or proceedings now pending therein, nor shall it affect any judgment or order already made, or proceedings already taken.

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\* CHAPTER CCCCLII.

*An Act in relation to the Probate Court in the City and County of San Francisco.*

[Approved May 18th, 1861.]

SECTION 1. The County Judge of the County of San Francisco, acting as Probate Judge, shall hold a term of the Probate Court in the City and County of San Francisco, on the first Monday of January, March, May, July, September and November, of each year; *provided*, that each term of said Court shall, either with or without intermediate adjournments, continue to the commencement of the next term.

SECTION 2. Monday in each week is hereby set apart for the special transaction of business in said Court, which day shall be known as the general probate day of said Court. But nothing herein shall prevent the transaction of business in said Court upon other days.

SECTION 3. In case of the absence of the said Judge from said Court, upon any day upon which any order, notice, process, matter, or business whatever, shall be made returnable to said Court, or may come on, or be set for hearing, examination, or determination thereon, or be pending on said Court, no such order, notice, process, matter, or business, shall fail by reason of such absence, but the same shall be continued to the next general probate day of said Court; and in case of the further continuation of such absence, shall be continued from one general probate day to another, until the said Judge shall be present in said Court upon a general probate day. The Clerk of said Court shall make an entry in the minutes of said Court of every such absence, and such entry shall be conclusive evidence of the fact of such absence, and of any and every continuance provided for by this section.

SECTION 4. All acts and parts of acts, so far as the same conflict with this Act, are hereby repealed.

SECTION 5. This Act shall take effect from and after its passage.

§ 67. *Jurisdiction of Justices' Courts.*

[1856.] Justices' Courts shall have jurisdiction of the following actions and proceedings:

1st. Of an action arising on contracts for the recovery of money only, if the sum claimed, exclusive of interest, does not exceed two hundred dollars;

2d. Of an action for damages for injury to the person, or for taking or detaining personal property, or for injuring real or personal property, if the damages claimed do not exceed two hundred dollars;

3d. Of an action for a fine, penalty or forfeiture, not exceeding two hundred dollars, given by statute or the ordinance of an incorporated city;

4th. Of an action upon a bond conditioned for the payment of money not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due; when the payments are to be made by installments, an action may be brought for each installment as it becomes due;

5th. Of an action upon a surety, bond or undertaking taken by them, though the penalty exceed, if the amount claimed does not exceed two hundred dollars;

6th. Of an action for the foreclosure of any mortgage, or the enforcement of any lien on real or personal property, when the debt secured does not exceed, exclusive of interest, two hundred dollars;

7th. Of an action to recover the possession of personal property, when the value of such property does not exceed two hundred dollars;

8th. To take and enter judgment on the confession of a defendant, when the amount confessed does not exceed two hundred dollars;

9th. Of an action for a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements or other possession;

10th. Of an action to determine the right to a mining claim, and for damages for injury to the same, when the damages claimed do not exceed two hundred dollars;

11th. Of proceedings respecting vagrants and disorderly persons.

1. Justices of the Peace alone have power to try and commit deserted seamen, under the Acts of Congress; and Commissioners under the United States Courts can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

2. The law presumes nothing in favor of the jurisdiction of Justices' Courts; and a party who asserts a right under the judgment of a Justice, must affirmatively show every fact necessary to show such jurisdiction. *Swain v. Chase*, 12 Cal. 265.

3. All cases in law and in equity, when the amount in dispute does not exceed two hundred dollars, exclusive of interest, are left undisposed of by the Constitution, for the Legislature to confer on County Courts as "special cases," or on Justices' Courts; and any Act conferring jurisdiction on Justices' Courts over two hundred dollars is unconstitutional and void, except in proceedings under the statute concerning forcible entry and unlawful detainer. *Zander v. Coe*, 5 Cal. 234; *Ford v. Smith*, Id. 331; *Hart v. Moore*, 6 Id. 162; *Small v. Guinn*, Id. 449; *Freeman v. Powers*, 7 Id. 106; *People v. Fowler*, 9 Id. 86.

4. Judgment by consent or confession for over two hundred dollars in a Justice's Court is void. Consent of parties cannot give jurisdiction prohibited by the Constitution. *Feillett v. Engler*, 8 Cal. 77.

5. The fact that the thing in dispute, a mining claim, is worth more than two hundred dollars, ousts the Justice of his jurisdiction. *Freeman v. Powers*, 7 Cal. 104.

### § 68. *Exceptions to jurisdiction.*

[1856.] The jurisdiction conferred by the last section shall not extend, however:

1st. To a civil action in which the title to real property shall come in question;

2d. Nor to an action or proceeding against ships, vessels or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this State.

1. A Justice, instead of trying a case for forcible entry and unlawful detainer, certified it to the District Court. The transfer was illegal, and cannot defeat the plaintiff's rights by operating as a discontinuance. He should have tried the case as if no transfer were made. *Larue v. Gaskins*, 5 Cal. 509.

### § 69. *Shall also have jurisdiction of certain public offenses.*

[1855.] These Courts shall also have jurisdiction, except within the limits of the City of San Francisco, of the following public offenses committed within the respective counties in which such Courts are established:

1st. Petit larceny;

2d. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties, or with intent to kill;

3d. Breaches of the peace, riots, affrays, committing a willful injury to property; and all misdemeanors, punishable by fine, not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

1. The Act conferring criminal jurisdiction is constitutional. *People v. Fowler*, 9 Cal. 85.

§ 70. *Justices' Courts shall be always open.*

There shall be no terms in Justices' Courts; these Courts shall always be open.

§ 71. *Term, election and qualification of Justices.*

Justices of the Peace shall hold their offices for one year, and until their successors are elected and qualified.\* They shall be chosen by the electors of their respective townships or cities at the general election in the year one thousand eight hundred and fifty-three, and at the general election every year thereafter, and shall enter upon their duties on the first Monday of the month subsequent to their election. Whenever a vacancy shall occur in the office of a Justice, by death, resignation or otherwise, a special election may be ordered by the County Judge to supply such vacancy. The Justice elected to supply a vacancy shall hold his office only for the unexpired term of his immediate predecessor. Each Justice, before entering upon the discharge of his duties, shall take the constitutional oath of office, and shall execute a bond to the State in the sum of five thousand dollars, conditioned for the faithful performance of his duties, and file the same with the County Clerk.

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CHAPTER IX.—*Recorders' Courts.*

SEC. 72. *Jurisdiction of Recorders' Courts.*

73. *Also of certain offenses.*

74. *Judge of Recorder's Court. Place of holding the Court.*

75. *Election and qualification.*

76. *Compensation of Recorders.*

77. *Recorders shall be committing magistrates.*

78. *May issue all necessary process.*

79. *These Courts to be always open.*

§ 72. *Jurisdiction of Recorders' Courts.*

† The Recorders' Courts which are already established, or which

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\* Except in the City and County of San Francisco, where Justices of the Peace are elected for two years. (See Statutes of 1861, 214, and 1862, 475.)

† CONSOLIDATION ACT OF THE CITY AND COUNTY OF SAN FRANCISCO.

[As amended April 18th, 1867.]

SECTION 19. The Police Judge throughout the city and county shall have the same powers

may hereafter be established, in any incorporated city of this State, shall have jurisdiction :

1st. Of an action or proceeding for the violation of any ordinance of their respective cities;

2d. Of an action or proceeding to prevent or abate a nuisance within the limit of their respective cities;

3d. Of proceedings respecting vagrants and disorderly persons.

*§ 73. Also of certain offenses.*

The Recorders' Courts already established, or which may hereafter be established, shall also have jurisdiction of the following public offenses committed in their respective cities:

1st. Petit larceny;

2d. Assault and battery, not charged to have been committed upon a public officer, in the execution of his duties, or with intent to kill;

3d. Breaches of the peace, riots, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or by both such fine and imprisonment.

*§ 74. Judge of Recorder's Court. Place of holding the Court.*

A Recorder's Court shall be held by a Judge, who shall be designated as the "Recorder of the city;" and said Court shall be

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and jurisdiction in all cases, as are or hereafter may be, conferred by law upon Recorders' Courts, and in all criminal cases, in addition thereto, the powers and jurisdiction of a Justice of the Peace; also, jurisdiction of every offense or act which, by common law, is declared to be a misdemeanor, (and for which no punishment is specially prescribed by law) with power to punish by imprisonment in the county jail or city prison, not exceeding six months, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment; and he shall also have jurisdiction to try and punish all offenses committed against the rules and regulations established by the Board of Supervisors, in pursuance of the authority granted by this Act, except where it is otherwise provided, and may commit, or hold the offender to jail for trial in the proper Court, or may try, condemn, or acquit, and carry his judgment into execution, as the case may require according to law; and shall have power to issue warrants of arrest, subpoenas, and all other process necessary to the full and proper exercise of his powers and jurisdiction. All fines imposed by the Police Judge, not exceeding twenty dollars, exclusive of costs, shall be final and without appeal; his Court shall be a Court of Record; a Clerk shall be appointed therefor by the Board of Supervisors, with a salary of twelve hundred dollars a year, (increased to two hundred dollars per month; statutes 1862, p. 479) who shall give bond as required by law, and hold his office during the pleasure of said Board.

SECTION 20. Proceedings in the Police Judge's Court shall be conducted in conformity with the laws regulating proceedings in the Recorder's Court. The said Court shall be open daily, Sundays excepted, and may be held by any Justice of the Peace of the city and county, in case of the temporary absence of the Police Judge, or his temporary disability to act from any cause. In case of a vacancy in the office of Police Judge, the Board of Supervisors shall have power to appoint any Justice of the Peace of the said city and county to fill the vacancy until the next election, when the office shall be filled by election for a full term.

held at such place in the city within which it is established, as the Government of such city may by ordinance direct.

§ 75. *Election and qualification.*

The Recorders shall be chosen by the electors of their respective cities, on a day to be fixed by the Government of such cities, and shall hold their offices for one year, unless a longer period be fixed in the Acts incorporating such cities, in which case, for such period fixed. Before entering upon their duties, they shall take the constitutional oath of office.

§ 76. *Compensation of Recorders.*

The Recorders shall receive a compensation to be fixed by the charter, or when not so fixed, by the Government of their respective cities, to be paid by such cities quarterly, in equal proportions. Such compensations shall not be increased or diminished during the period for which they are elected.

§ 77. *Recorders shall be committing magistrates.*

The Recorders shall possess the powers and exercise the duties of committing magistrates, in the criminal cases in which the Courts held by them have no jurisdiction by this Act; and as such magistrates, they may examine, commit or discharge, all persons brought before them, as the justice of the case may require.

§ 78. *May issue all necessary process.*

Recorders and Recorders' Courts may issue all process, writs and warrants, and may make any and all orders necessary and proper to the complete exercise of their powers.

§ 79. *These Courts to be always open.*

There shall be no terms in Recorders' Courts. These Courts shall always be open.

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CHAPTER X.—*Mayors' Courts.*

SEC. 80. *Jurisdiction of Mayors' Courts.*

81. *Mayors shall be committing magistrates.*

82. *May issue all necessary process.*

§ 80. *Jurisdiction of Mayors' Courts.*

The Mayors' Courts which are already established, or which may hereafter be established in any incorporated city of this State, shall have the same jurisdiction of actions and of public offenses committed in their respective cities, which is conferred by this Act upon Recorders' Courts.

§ 81. *Mayors shall be committing magistrates.*

The Mayors of incorporated cities, when authorized by law to hold a Court in their respective cities, shall possess the same powers as committing magistrates as are conferred by this Act upon Recorders of cities.

§ 82. *May issue all necessary process.*

The Mayors' Courts, and the Mayors as the Judges of such Courts, may issue all process, writs and warrants, and may make any and all orders necessary and proper to the complete exercise of their powers.

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CHAPTER XI.—*General provisions respecting the Courts of Justice and Judicial Officers.*

ARTICLE I.

COURTS OF RECORD: PUBLICITY OF THE PROCEEDINGS OF THE COURTS  
AND THEIR INCIDENTAL POWERS.

SEC. 83. *What shall be Courts of Record.*

84. *The sittings of Courts shall be public.*

85. *Except a trial of an action for divorce.*

86. *Certain powers inherent in all Courts.*

§ 83. *What shall be Courts of Record.*

The Supreme Court, the several District Courts, the Superior Court of the City of San Francisco, the several County Courts, the several Courts of Sessions, and the several Probate Courts of this State, shall be Courts of Record.

§ 84. *The sittings of Courts shall be public.*

The sittings of every Court of Justice shall be public, except as is provided in the next section.

§ 85. *Except a trial of an action for divorce.*

In an action for divorce, the Court may direct the trial of any issue of fact joined therein to be private; and upon such directions, all persons may be excluded except the officers of the Court, the parties, their witnesses and counsel.

§ 86. *Certain powers inherent in all Courts.*

Every Court shall have power:

1st. To preserve and enforce order in its immediate presence;

2d. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

3d. To compel obedience to its lawful judgments, orders and process, and to the lawful orders of its Judge out of Court, in an action or proceeding pending therein;

4th. To control in furtherance of Justice the conduct of its ministerial officers.

## ARTICLE II.

### PARTICULAR DISQUALIFICATION OF JUDGES.

SEC. 87. *When a Judge shall not act as such.*

88. *When he shall not act as an attorney.*

89. *When a Judge of the Supreme Court or a District Court may act as attorney.*

90. *A Judge shall not have a partner acting as attorney.*

91. *Judges shall not absent themselves from the State.*

§ 87. *When a Judge shall not act as such.*

A Judge shall not act as such in any of the following cases:

1st. In an action or proceeding to which he is a party, or in which he is interested;

2d. When he is related to either party by consanguinity or affinity, within the third degree;



3d. When he has been attorney or counsel for either party in the action or proceeding; but this section shall not apply to the arrangement of the calendar or the regulation of the order of business.

1. The exhibition by a Judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, although exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the Court, and bring the administration of Justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the Judge is disqualified from sitting. *McCauley v. Weller*, 12 Cal. 523.

§ 88. *When he shall not act as an attorney.*

A Judge shall not act as attorney or counsel in a Court in which he is Judge, or in an action or proceeding removed therefrom to another Court for review, or in any action or proceeding from which an appeal may lie to his own Court.

§ 89. *When a Judge of the Supreme Court or a District Court may act as attorney.*

A Judge of the Supreme Court, or of the District Court, or of the Superior Court of the City of San Francisco, shall not act as attorney or counsel in any Court, except in an action or proceeding to which he is a party on the record.

§ 90. *A Judge shall not have a partner acting as attorney.*

A Judge or Justice of the Peace shall not have a partner acting as attorney or counsel in any Court in this State.

§ 91. *Judges shall not absent themselves from the State.*

A Judge of the Supreme Court, or of the District Court, or of the Superior Court of the City of San Francisco, or of a County Court, shall not absent himself from the State.

## ARTICLE III.

### JUDICIAL DAYS AND PLACES OF HOLDING COURTS OF JUSTICE.

SEC. 92. *Judicial days.*

93. *Nonjudicial days. Exceptions.*

94. *Place of holding the Courts mentioned in this Act.*

95. *Adjournment of Court for nonattendance of a Judge.*

96. *Place of holding a Court may be changed.*

97. *When so changed, all persons shall appear at the appointed place.*

§ 92. *Judicial days.*

The Courts of Justice may be held and judicial business may be transacted on any day, except as provided in the next section.

§ 93. *Nonjudicial days. Exceptions.*

No Court shall be opened nor shall any judicial business be transacted on Sunday, on New Year's Day, on the Fourth of July, on Christmas Day, on Thanksgiving Day, or on a day in which the general election is held, except for the following purposes:

- 1st. To give, upon their request, instructions to a jury then deliberating on their verdict;
- 2d. To receive a verdict, or discharge a jury;
- 3d. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

§ 94. *Place of holding the Courts mentioned in this Act.*

Every Court of Justice, except a Justice's, Mayor's, or Recorder's Court, shall sit at the county seat of the county in which it is held, except in the cases provided in this article. Justices' Courts shall be held in their respective townships or cities, and Mayors' and Recorders' Courts in their respective cities; provided, Justices of the Peace for townships of the County of San Francisco, within the corporate limits of the City of San Francisco, shall have jurisdiction within said corporate limits, of all actions and proceedings of which Justices of the Peace of said county have or may have by law jurisdiction, whenever the parties to the said actions or proceedings may reside in said city; and provided, that no Justice of the Peace shall hold a Court in any other township of said county or city than the one for which he shall have been elected.

§ 95. *Adjournment of a Court for nonattendance of a Judge.*

If no Judge attend on the day appointed for the holding the Court, before noon, the Sheriff or Clerk shall adjourn the Court until the next day at ten o'clock, and if no Judge attend on that day before noon, the Sheriff or Clerk shall adjourn the Court until the following day; and so on from day to day, for one week. If no Judge attend for one week, the Sheriff or Clerk shall adjourn the Court for the term.

§ 96. *Place of holding Court may be changed.*

A Judge authorized to hold or preside at a Court appointed to be held in a city or town may, by an order filed with the County Clerk, and published as he may prescribe, direct that the Court be held or continued at any other place in the city or county than that appointed, when war, pestilence, or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the Court, may render it necessary; and may in the same manner revoke the order, and in his discretion appoint another place in the same city or county for holding the Court.

§ 97. *When so changed, all persons shall appear at the appointed place.*

When the Court is held at a place appointed as provided in the last section, every person held to appear at the Court shall appear at the place so appointed.

## ARTICLE IV.

### SEALS OF THE COURTS OF JUSTICE.

SEC. 98. *What Courts shall have seals.*

99. *Seals used at the time of the passage of this Act, adopted.*

100. *Seals prescribed for other Courts.*

101. *Until seals are procured, the Clerk may use his private seal.*

102. *Keeper of the seal.*

103. *Proceedings to which a seal must be affixed.*

104. *Manner of affixing the seal.*

§ 98. *What Courts shall have seals.*

[1860.] Each of the following Courts, and no other, shall have a seal: 1st, the Supreme Court; 2d, the District Courts; 3d, the County Courts; 4th, the Courts of Sessions; 5th, the Probate Courts; 6th, the Police Judge's Court of the City and County of San Francisco.

§ 99. *Seals used at the time of the passage of this Act, adopted.*

The seals now used by the Supreme Court, and the Superior Court of the City of San Francisco, shall be the seals of the said Courts; and where seals have been provided for the County Courts, Courts of Sessions, and Probate Courts, such seals shall continue to be used as the seals of said Courts.

§ 100. *Seals prescribed for other Courts.*

[1860.] The several District Courts, and also the County Courts, Courts of Sessions, Probate Courts, Police Judge's Court of the City and County of San Francisco, for which separate seals have not been heretofore provided, shall direct their respective Clerks to procure seals, which shall be devised by the respective Judges of such Courts, and shall have the following inscriptions surrounding the same:

1st. For the District Courts: "District Court,———county, California," inserting the name of the county;

2d. For the County Courts: "County Court,———county, California," inserting the name of the county;

3d. For the Courts of Sessions: "Court of Sessions,———county, California," inserting the name of the county;

4th. For the Probate Courts: "Probate Court,———county, California," inserting the name of the county;

5th. For the Police Judge's Court of the City and County of San Francisco: "Police Judge's Court of the City and County of San Francisco."

§ 101. *Until seals are procured, the Clerk may use his private seal.*

Until the seals devised, as provided in the last section, are procured, the Clerk of each Court may use his private seal, whenever a seal is required.

§ 102. *Keeper of the seal.*

The Clerk of each Court shall keep the seal thereof.

§ 103. *Proceedings to which a seal must be affixed.*

The seal of the Court need not be affixed to any proceedings therein, except:

- 1st. To a summons or writ;
- 2d. To the proof of a will, or the appointment of an executor, administrator or guardian ;
- 3d. To the authentication of a copy of a record, or other proceeding of the Court, or an officer thereof, for the purpose of evidence in another Court.

§ 104. *Manner of affixing the seal.*

The seal may be affixed by impressing it on the paper, or on a substance attached to the paper and capable of receiving the impression.

ARTICLE V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

- SEC. 105. *But one application shall be made for the same order.*
106. *Punishment for violation of the last section.*
107. *Judges, etc., may certify certain papers.*
108. *Vacancy in the office of Judge shall not affect any proceeding.*
109. *Proceedings shall be in the English language, except in certain counties.*
110. *Repealing certain Acts.*
111. *When this Act to take effect.*

§ 105. *But one application shall be made for the same order.*

If an application for an order, made to a Judge of a Court in which the action or proceeding is pending, be refused, in whole or in part, or be granted conditionally, no subsequent application for the same order shall be made to any other Judge, except of a higher Court; provided, that nothing in this section be so construed as to apply to motions refused for any informality in the papers or proceedings necessary to obtain an order.

§ 106. *Punishment for violation of the last section.*

A violation of the last section may be punished as a contempt; and an order, made contrary thereto, may be revoked by the Judge

who make it, or vacated by a Judge of a Court in which the action or proceeding is pending.

§ 107. *Judges, etc., may certify certain papers.*

The Judges of the Supreme Court, of the District Courts, of the Superior Court of the City of San Francisco, and of the County Courts, shall have power in any part of the State, and Justices of the Peace, and Recorders within their respective counties, and Recorders and Mayors, within their respective cities, shall have power to take and certify:

1st. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2d. The acknowledgment of satisfaction of a judgment of any Court;

3d. An affidavit to be used in any Court of Justice of this State.

§ 108. *Vacancy in the office of Judge shall not affect any proceeding.*

No action or proceeding in a Court of Justice shall be affected by a vacancy in the office of all or any of the Judges, or by the failure of a term thereof.

§ 109. *Proceedings shall be in the English language, except in certain counties.*

Every written proceeding in a Court of Justice in this State, or before a judicial officer, shall be in the English language; but such abbreviations as are now commonly used in that language may be used, and numbers may be expressed by figures or numerals, in the customary manner. In the counties of San Luis Obispo, Santa Barbara, Los Angeles and San Diego, the proceedings may be in the English or Spanish languages.

See Practice Act, § 446.

§ 110. *Repealing certain Acts.*

The following Acts are hereby repealed: The Act entitled an "Act concerning the Courts of Justice of this State and Judicial Officers," passed March eleventh, one thousand eight hundred and fifty-one; and the Act entitled an "Act amending the Act entitled

an Act concerning the Court of Justice of this State and Judicial Officers," passed March eleventh, one thousand eight hundred and fifty-one. Nothing in this Act shall, however, affect any judgment already rendered, or any order already made, under an Act entitled "An Act concerning the Courts of Justice in this State and Judicial Officers," passed March twenty-seventh, one thousand eight hundred and fifty-two; "An Act amendatory of an Act concerning Courts of Justice of this State and Judicial Officers," passed March eleventh, one thousand eight hundred and fifty-one, approved May third, one thousand eight hundred and fifty-two; the Act entitled "An Act to change the time of holding the District Court in the county of Santa Clara," passed March twenty-ninth, one thousand eight hundred and fifty-two; and the Act entitled "An Act to regulate the terms of the District Courts of the Tenth Judicial District," passed May fourth, one thousand eight hundred and fifty-two; or any proceedings already taken, in any civil or criminal cases, in any of the Courts of this State; nor shall it be construed so as to remove from office any of the Judges of the existing Courts of this State.

§ 111. *When this Act to take effect.*

This Act shall take effect on the first Monday of June next.  
(May 19th, 1853.)

AN ACT  
CONCERNING FORCIBLE ENTRY AND UNLAWFUL  
DETAINERS.\*

[Passed April 22d, 1850; and Acts amendatory thereof.]

*The People of the State of California, represented in Senate and  
Assembly, do enact as follows :*

§ 1. No person or persons shall hereafter make any entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases, not with strong hand nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine.

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\*ACT OF 1861, CHAPTER CCCCLXII, 514.

(Approved May 18th, 1861.)

*Act relating to the Rights and Duties of Landlords and Tenants.*

SEC. 1. Wherever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing, to the tenant, requiring him to remove from the premises.

SEC. 2. Such notice shall be served by delivering the same to such tenant, or to some person of proper age residing on the premises; or, if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read.

SEC. 3. At the expiration of one month from the service of such notice, the landlord may reënter, or maintain ejectment, or proceed in the manner prescribed by law to remove such tenant, without any other or further notice to quit.

SEC. 4. If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant, his executors or administrators, shall, from thenceforward, pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, to be sued for and recovered, at the same time and in the same manner, as the single rent; and



1. **This statute must be strictly construed.**—The statute concerning forcible and unlawful detainer must be strictly construed. *House v. Keiser*, 8 Cal. 499.

2. The true construction of this Act, as to the mode of proceeding, would seem to be this: the case must be governed by the provisions of the Act, so far as they go, and as to other matters not embraced in the words of the Act, the general rules governing proceedings in these Courts will apply. *People v. Harris*, 9 Cal. 572.

3. **When the action of forcible entry and detainer may be maintained.**—The action of forcible entry and detainer may be maintained in three cases: first, when the entry is forcible; second, when the entry is simply unlawful, and the detainer forcible; third, when the entry was lawful, and the holding over forcible. But in all cases, there must be something of personal violence, either threatened or actual. *Dickinson et al. v. Maguire et al.*, 9 Cal. 46.

4. The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Question of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title and present right of possession is shown to be in the defendant. *McCauley v. Weller*, 12 Cal. 500.

5. Where parties threaten to take forcible possession of property, and the complaint does not aver the insolvency of the defendants, and that there is no adequate remedy at law, an injunction will not be granted; where forcible possession is taken, forcible entry and detainer would be a speedy mode of regaining possession, and for other damages, the usual proceedings at law would suffice. *Tomlinson v. Rubio*, 16 Cal. 201.

6. Where in ejectment by B. & K., a writ of restitution was issued on judgment in favor of B., and under it K. was removed from the land by the proper officer, and W. put in possession, as agent of B., and then, about a month afterwards, W. leased the premises to H.: Held, that K. cannot maintain forcible entry and detainer against H., the lessee, on the ground that the act of the officer in removing and putting W. in possession was *tortious*, because not justified by the writ. *Kennedy v. Hamer*, 19 Cal. 375.

7. **Possession.**—In cases of this kind, the statute does not require an allegation of possession by the plaintiff. *Cronise v. Carghill*, 4 Cal. 120.

such double rent shall be continued to be paid during all the time such tenant shall continue in possession, as aforesaid.

SEC. 5. If any tenant, or any other person, who may have come into the possession of lands or tenements under or by collusion with such tenant, shall willfully hold over any lands or tenements, after the termination of such term, and after demand made, and one month's notice in writing, given in the manner hereinbefore prescribed, requiring the possession thereof by the person entitled thereto, such person holding over shall pay to the person so kept out of possession, or his representatives, at the rate of double the monthly value of the lands or tenements so detained, for so long a time as he shall so hold over or keep the person entitled out of possession; and shall also pay and remunerate all special damages whatever to which the person so kept out of possession may be subjected by reason of such holding over; and there shall be no relief in equity against any recovery had at law under this section.

[Sec. 4, 1861, 1862.\*] In all leases of lands and tenements, or any interests therein, from month to month, the landlord is hereby authorized, upon giving notice, in writing, at least fifteen days before the expiration of the month, to change the terms of the lease, to take effect at the expiration of said month. Said notice, when served upon the tenant, shall of itself operate, and be effectual to create and establish, as a part of the lease, the terms, covenants, and conditions specified in said notice; provided, that if the tenant shall surrender and yield up to the landlord the lands, tenements, or interests therein held by him, at or before the expiration of said month, he shall not be bound by the terms, covenants, or conditions set forth in said notice. (Approved April 25th, 1862.)

\* Statutes of 1862, 421; Statutes of 1861, 538.

8. The plaintiff in an action of forcible entry and detainer, must show an actual peaceable possession in himself at the time of the entry. *Trent v. Stuart et al.*, 5 Cal. 113.

9. What is an actual, and what a constructive possession, in many cases, must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 63.

10. Where the plaintiff in an action of forcible entry for the front of a town lot, proved that he had a small house on the rear of it: *Held*, to be sufficient to warrant the jury in finding an actual possession of the whole lot. *Id.*

11. A mere scrambling or interrupted possession is not sufficient to maintain the action, but it must be actual, peaceable, and exclusive. *House v. Keiser*, 8 Cal. 499.

12. An action of forcible entry and detainer will not lie against a party claiming a right to land, who is not in the actual possession. *Preston v. Kehoe*, 10 Cal. 445.

13. To sustain forcible entry and detainer, plaintiff must have been in actual possession; and when the land is public land, not taken up under our Possessory Act, nor under the Federal laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient. *Preston v. Kehoe*, 15 Cal. 315.

14. Where plaintiff had been in the peaceable and quiet possession and use of the premises through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in the "actual possession" of the premises, within the statute of forcible entry and detainer. *Minturn v. Burr*, 16 Cal. 107.

15. The statute does not require actual occupancy, and "actual possession" consists as much of a present power and right of dominion as of an actual corporal presence in the house. *Id.*

16. In actions of forcible entry and detainer, the fact of possession, and not the right of possession, is what is to be determined. *James Mitchell v. Davis*, 20 Cal. 45.

17. **Force, facts which constitute.**—Where a party of four or five men enter a building occupied by another, in the night time, during the hours of sleep, and take possession, and avow their intention to keep possession, and actually do keep possession, it is sufficient evidence of force to maintain the action of forcible entry and detainer. *Scarlett v. Lamarque et al.*, 5 Cal. 63.

18. Facts which might constitute a mere trespass upon property have never been held to sustain the action of forcible and unlawful detainer. *Frazier et al. v. Hanlon*, 5 Cal. 156.

19. Force, either actually applied or justly to be feared from the conduct of the defendant, is essential to the support of this action. *Id.*

20. To sustain an action of forcible entry, or forcible and unlawful detainer, actual force, threats of violence in the entry, or the just apprehension of violence to the person, must be shown to have existed, unless the detainer be riotous. *Id.*

21. Our statute of forcible entries and detainers provides a remedy for an unlawful entry, as well as a forcible entry, and the policy of it is doubtless to avoid nice distinctions as to what constitutes force in an entry upon lands. *Moore et al. v. Goslin*, 5 Cal. 266.

22. Where the Governor of the State, who is authorized, and it is made his duty by law, to take immediate possession of the State prison grounds, then in the possession of a lessee of the State, goes, in company with other officers of State, upon the grounds of the prison, and demands of the person in charge the keys of the prison, which being refused, the door of the room in which the keys were, was forced by order of the Governor, and the keys taken, and thus the possession of the prison and grounds taken by the Governor in the name and on behalf of the State: *Held*, that such acts amounted to a forcible entry on the part of the Governor, and he is personally liable therefor. Further, *Held*, that the acts of the Governor warranted the conclusion that any attempt on the part of the lessee to resume possession of the prison would be resisted by force. *McCauley v. Weller*, 12 Cal. 500.

23. **Fraud or willful wrong.**—In an unlawful entry, there must be some ingredient of fraud or willful wrong on the part of the party making the entry. *Dickinson et al. v. Maguire et al.*, 9 Cal. 46.

24. **Parties.**—A subtenant can be made liable to the original lessor in an action for use and occupation, or for rent, only for the time during which the occu-

pancy of the premises by the subtenant continued. *Pierce v. Minturn*, 1 Cal. 470.

25. A tenant in common cannot maintain an action of forcible entry and detainer against his cotenant for holding over. The land must first be partitioned. *Lick v. O'Donnell*, 3 Cal. 59.

26. The remedy is a summary one, given by statute to protect the possession, and cannot be extended by implication to any other than the real occupants. *Treat v. Stuart*, 5 Cal. 113.

27. A landlord cannot sue in this form, in his own name, for an unlawful entry upon the possession of his tenant. *Id.*

28. This action can only be maintained by the person ousted; his grantee cannot maintain the action. *House v. Keiser*, 8 Cal. 499.

29. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 107.

30. In an action of forcible entry, the persons by whose direction, agency and procurement the forcible entry is made, are liable in the action. *Minturn v. Burr*, 20 Cal. 48.

31. The action may be brought by the husband and wife, if the wife is a sole trader. *Howard v. Valentine*, 20 Cal. 282.

32. **Complaint.**—The objection to a complaint in forcible entry and detainer, that it does not aver "actual possession"—the word "possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended; but it cannot be urged in the Supreme Court for the first time. *Minturn v. Burr*, 16 Cal. 107.

33. The statute does not require an allegation of possession by the plaintiff; this objection is at most only subject to demurrer. *Cronise v. Carghill*, 4 Cal. 120.

34. The rule that a penal statute must be declared upon by the party seeking recovery under it, does not apply to pleadings in Justices' Courts. *O'Callaghan v. Booth*, 6 Cal. 63.

35. **General denial sufficient.**—Where in such case the complaint verified alleges such demand, and the answer verified, instead of specifically denying the allegation, denies generally "each and every allegation" in the complaint: *Held*, that this general denial put plaintiff on proof of demand, and of everything necessary to maintain the action. *Sullivan v. Cury*, 17 Cal. 80.

36. **What may be tried in the action.**—FIELD, J.—The validity of the lease under which the lessee held the premises cannot be tried in this action, nor can the lessee be deprived of the advantages resulting from the possession of the premises under the lease, by a forcible ouster under legislative enactment. *McCauley v. Weller*, 12 Cal. 500.

37. **Description of the land.**—In forcible entry and detainer, a description of the land, sufficiently definite to enable the administration of substantial justice, is all that is required in actions before Justices of the Peace. *Hernandez v. Simon*, 4 Cal. 182.

38. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres). "The said ten rods square being situated from twenty to fifty feet, more or less, southeasterly from the house of defendant, and near the gate aforesaid, and the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: *Held*, that the variance in the

description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the northwesterly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 73.

39. **Evidence.**—In an action of forcible entry and detainer, the holding over the land is the foundation of the action, and must necessarily be proved, like any other substantive fact. *Reed v. Grant*, 4 Cal. 176.

40. Proof of actual force is not necessary to maintain this action; but threats, etc., showing an intention to resort to violence if resistance is offered, are sufficient. *O'Callaghan v. Booth*, 6 Cal. 63.

41. Where a plaintiff had obtained judgment in another Court for a quarter's rent under a lease: *Held*, that in an action of forcible entry for nonpayment of another quarter's rent under the same lease between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Love v. Waltz*, 7 Cal. 250.

42. Where the complaint avers forcible and unlawful entry, and that defendants forcibly detained the premises so unlawfully taken, forcible entry must be proven—the averment of detainer not being stated as an independent ground of relief. *Preston v. Kehoe*, 15 Cal. 315.

43. In such action, proof of forcible detainer does not prove forcible entry. *Id.*

44. Where a building locked up, and so in possession of plaintiff, has been entered by third persons, and taken possession of forcibly and unlawfully, and is detained, it should be left to the jury to determine how and by whose direction, agency or procurement the entry was made, and whether by preconcert and arrangement or not; and if they find possession was taken by the act, agency and coöperation of all the defendants, and the holding, whether by one or many, was in pursuance of such arrangement or preconcert, then the defendants are guilty of the entry and detainer. *Minturn v. Burr*, 16 Cal. 107.

45. In an action of forcible entry and detainer, in order for the plaintiff to recover possession of land held by preëmption, it is indispensable to prove that the premises upon which the defendant entered were within the lines described in the plaintiff's affidavit. *Edward Cummins v. Edward Scott*, 20 Cal. 83.

46. The plaintiff in this action must show an actual peaceable possession in himself, at the time of the entry, *Treat v. Stuart*, 5 Cal. 113.

47. What is actual, and what constructive possession, in many cases, must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 63.

48. When the plaintiff in an action for a forcible entry, for the front of a town lot, proved that he had a small house on the rear of it: *Held*, sufficient to warrant a jury in finding an actual possession of the whole lot. *Id.*

See *ante*, Possession.

49. **Verdict.**—In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: *Held*, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. and V.; and that the corporation did not participate in the trespass. *Fremont v. Crippen*, 10 Cal. 211.

50. The peaceable and actual possession of the plaintiff is incompatible with the lawful possession of another, and such a verdict is conclusive against the possession of the corporation. *Id.*

§ 2. Any Justice of the Peace shall have authority to inquire, as hereinafter directed, as well against those who make unlawful or forcible entry into lands, tenements or other possessions, and detain the same, as against those who, having lawful and peaceful entry into lands, tenements or other possessions, unlawfully detain the same; and if it be found, upon such inquiry, that an unlawful or

forcible entry hath been made, and that the said lands, tenements, or other possessions, after a lawful entry, are held unlawfully, then such Justice shall cause the party complaining to have restitution thereof.

1. **Jurisdiction.**—A case of forcible entry and detainer was legally brought before a Justice of the Peace, but he being a witness in the cause, acting under the twentieth section of the Practice Act, sent it to the Mayor of M., who, having no jurisdiction, returned it to the successor of the Justice, (who had in the meantime resigned) before whom it was decided: *Held*, that the mere fact of sending the cause to the Mayor could not be a subject of complaint, and that the judgment of the Justice's Court be sustained. *Davis v. Gallen*, 2 Cal. 358.

2. The Recorder of the City of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise v. Carghill*, 4 Cal. 120.

[SEC. 3, 1861.\*] When any complaint shall be made in writing, under oath, to any Justice of the Peace, of any such unlawful or forcible entry, or unlawful detainer, said Justice shall issue a summons, directed to the Sheriff or any Constable of the county, commanding him to summon the person or persons against whom such complaint shall have been made, to appear before the said Justice on a day in such summons named, which shall not be less than two, nor more than ten days from the day of issuing such summons, and at the place therein mentioned.

§ 4. Such summons shall be served upon the person or persons against whom the same is issued, by delivering a certified copy thereof to such person or persons, at least two days before the return day thereof; and the officer serving the same shall make a special return of the time and manner of serving such summons.

§ 5. After the return of the summons, served as hereinbefore provided, and at the time and place appointed in said summons, the Justice shall proceed to hear and determine said complaint, unless either party shall demand a jury; in which case the Justice shall issue a venire for a jury in the same manner and upon the same terms as in other cases provided for trial by jury in Justices' Courts, and such jury shall be sworn as in other cases.

§ 6. If, at the time of making of such complaint, it shall be made to appear that the person or persons against whom said complaint is made, or either of them, are absent from the county, it shall be the duty of the Justice before whom the same is made to issue his summons, as hereinbefore provided, and the same may be

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\*Statutes of 1861, 582.

served by leaving a certified copy thereof at the last and usual place of abode of such person or persons, not less than two days before the return day thereof, which copy shall be left with some member of the family, or some person residing at such place, of suitable age and discretion, to whom the contents thereof shall be explained by the officer leaving the same, and the officer shall make a special return of the time and manner of serving said summons, and the suit shall thereafter proceed the same as though a personal service were had of such summons.

§ 7. The Justice may, at his discretion, adjourn any trial under this Act, not exceeding ten days, and when the defendant, his agent, or attorney, shall make oath that he cannot safely proceed to trial, for want of some material witness, naming him, that he has made due exertion to obtain such witness, and believes, if an adjournment be allowed, he will be able to procure the attendance of such witness, or his deposition, in time to produce the same upon the trial; in which case, if such person or persons will give bond, with one or more sufficient sureties, conditioned to pay the said complainant for all rent that may accrue during the pending of such suit, and all costs and damages consequent upon such adjournment, the said Justice shall adjourn said cause for such reasonable time as may appear necessary, not exceeding three months.

§ 8. The testimony of any witness, which may be considered necessary by either party, may be taken in the same manner, and with the like effect as is provided for the taking of testimony in other cases in Justices' Courts.

§ 9. On the trial, the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of forcible entry, or was entitled to the possession of the premises at the time of a forcible holding over. The defendant may show in his defense that he, or his ancestors, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of one whole year together next before the said inquisition, and that his interest therein is not then ended or determined, and such showing shall be a bar to the prosecution, and in no case when the title of

land is necessarily involved shall a Justice of the Peace have cognizance.

§ 10. If, upon the trial of any complaint under this Act, the Justice or jury shall find the defendant or defendants, or either of them, guilty of the allegations in the complaint, said Justice shall thereupon enter judgment for the complainant to have restitution of the premises, and shall impose such fine, not exceeding one hundred dollars, considering all the circumstances, as he may deem just, and shall tax the costs for the complainant, and may issue execution therefor; and the said Justice shall also award and issue a writ of restitution; but if the said Justice or the jury find that the person complained of is not guilty, the Justice shall tax the costs against the complainant, and issue execution therefor.

§ 11. If the jury empaneled cannot agree upon a verdict, the Justice may, with the consent of the parties, discharge them, and issue a venire returnable forthwith, or at some other time agreed upon by the parties.

[SEC. 12, 1861.\*] In all cases of a verdict by the Justice, or jury, for the complainant, the damages shall be assessed, if claimed in the complaint, as well for waste and injury committed upon the premises as for the rents and profits during such detainer, and the verdict shall also find the monthly value of the rents and profits of the said premises; and the complainant shall be entitled to recover treble damages against the persons against whom judgment has been rendered; which damages shall be assessed by the Justice, or jury, and when so assessed shall be trebled by said Justice, and entered as a judgment in the cause upon which execution may issue.

1. **Damages.**—A, in pursuance of the provisions of the "Act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," entered upon unoccupied land, and marked it out, so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B.: *Held*, that in an action of forcible entry, A. could recover the land from B., but without a fine or treble damages. *Stark v. Barnes*, 4 Cal. 412.

2. The complaint in an action of forcible entry need not pray for treble damages, to warrant the Court in trebling them. *Hart v. Moon*, 6 Cal. 169.

3. The power of the County Court to treble the damages by way of penalty in actions of forcible entry, results by necessary implication from its power to try *de novo*. *O'Callaghan v. Booth*, 6 Cal. 63.

4. In forcible entry and detainer tried in the County Court, on appeal from a Justice's Court, plaintiff, having obtained a verdict for one hundred and fifty dol-

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\* Statutes of 1861, 552.

lars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the Supreme Court for *mandamus* to compel the Court below to render judgment for treble damages: *Held*, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this Court, if proper, by trebling the damages. *Early v. Munnix*, 15 Cal. 149.

5. *Query*: Whether, if plaintiff in forcible entry and detainer inserts in his complaint a conditional prayer, that if waste be committed on the property pending the suit, investigation be had in relation thereto, and the damages occasioned thereby be allowed, he is then entitled to prove such damages, and have them assessed by the jury. *Hicks v. Herring*, 17 Cal. 566.

6. Under the twelfth section of our Forcible Entry and Detainer Act, plaintiff is not compelled to claim damages for waste and injury, or for rents and profits. He may simply claim possession; and, in a subsequent suit, may recover damages for waste committed pending the action of forcible entry and detainer. *Id.*

7. In forcible entry and detainer, it is optional with plaintiff either not to claim any damages, or to claim only such as arise from loss of rents, or from waste, or from both. There is no such connection between the rents and profits and waste committed as to require the damages from the loss of the one and the commission of the other to be united in the demand. *Id.*

8. In actions for damages for waste, the rule is, that the proof of damage may extend up to the time of verdict as to all facts which flow as a natural result from the injury for which suit is brought. *Id.*

9. Section twelve provides that "damages shall be assessed as well for waste and injury committed upon the premises, as for the rents and profits during the detainer," and the verdict shall find the monthly value of the rents and profits. The meaning of this is, that the rents are to be regarded merely as damages, and that their amount during the period of the detention is to be ascertained by estimating their monthly value. *Howard v. Valentine*, 20 Cal. 282.

10. The plaintiff in an action under this section can only recover the rents which accrue after the possession of the tenant becomes unlawful; the rents accruing prior to that time are not recoverable. *Id.*

11. The amount of rents is immaterial, and whether it is one dollar or one thousand dollars, the jurisdiction is the same. *Id.*

12. Rents and profits may be awarded on damages without the value thereof being stated in the complaint. *Holmes v. Horber*, Oct. term, 1862.

§ 13. [1861, 1862.\*] When any person or persons shall hold over any lands, tenements, or other possessions, after the termination of the time for which they are demised or let to him, her, or them, or to the person under whom he, she, or they hold, or after any rent shall become due, according to the terms of such lease or agreement, and shall remain unpaid for the space of three days after demand for payment thereof, in all such cases, if the lessor, his heirs, executors, assigns, agent, or attorney shall make demand, in writing, of such tenant, or tenants, that he, she, or they shall deliver the possession of the premises held as aforesaid, and if such tenant, or tenants shall refuse or neglect, for the space of three days after such demands, to quit the possession of such lands and tenements, or to pay the rent thereof, due and unpaid as aforesaid, upon com-

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\* Statutes of 1862, 420; Statutes of 1861, 582.



plaint therefor to any Justice of the Peace of the proper county, the Justice shall proceed to hear, try, and determine the same, in the same manner as in other cases hereinbefore provided for, but shall impose no fine in any such case mentioned in this section. It shall not be necessary, in order to work a forfeiture for nonpayment of rent, to make demand for rent on the day on which the same becomes due, or at any particular time of the day; but demand may be made of the tenant, in person, at any time within a year after such rent shall become due according to the terms of any lease or agreement, and may be made for the whole amount due and unpaid at the time of such demand; and the failure on the part of the lessee or his assigns, to pay such rent upon such demand being made, shall have the same force and effect as if demand had been made on the premises, towards sunset on the day when the rent became due. No person, other than actual occupants of the premises, shall be necessary parties defendant to proceedings provided for in this section; and in case a married woman be a tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage shall not be a defense in such proceedings; but in case her husband be not joined, or unless she be doing business as a sole trader, a judgment against her shall only be valid against property on the premises at the time of the trial.

See Acts *ante*, pages 577, 578.

1. By the thirteenth section of the Act concerning forcible entries and unlawful detainers, it was the intention of the Legislature to make the nonpayment of rent work a forfeiture of the estate of the tenant. But to effect this, the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chapman v. Emeric*, 3 Cal. 273.

2. A waiver of the demand will never be implied, for the purpose of making a forfeiture; for from its very nature, a forfeiture cannot take place by consent, and is not favored by the rules of law. *Gaskill v. Trainer*, 3 Cal. 334.

3. But if one of the conditions be forfeiture for nonpayment of rent, the mere failure to pay the rent will not make a forfeiture; there must be a formal demand made on the day it becomes due, to effect this. *Id.*

4. By the terms of an award which was decisive between a landlord and his tenant, the latter was to leave the premises on the ninth: *Held*, that the plaintiff had no right to give notice to quit until the tenth. After which, by the Act of Forcible Entry and Detainer, the plaintiff had six days to remove, wherefore the action commenced on the tenth was premature. *Ray v. Armstrong*, 4 Cal. 208.

5. In an action for unlawfully holding over after the expiration of the tenant's term, three days notice is all that is required. *Garbrell v. Fitch*, 6 Cal. 189.

6. In an action by a landlord against his tenant, under the thirteenth section of the Forcible Entry and Detainer Act, where the evidence showed a tenancy from year to year, plaintiff must show that he has terminated the tenancy by notice to quit; and if the tenant be permitted to hold over without notice to quit, a new term is created, and he cannot be legally dispossessed. *Sullivan v. Cary*, 17 Cal. 80.

7. In action by a landlord against his tenant, under the thirteenth section of the Forcible Entry and Detainer Act, plaintiff must show a demand in writing for possession of the premises. *Id.*

8. Where the record shows no demand of the rent, there can be no forfeiture. *Chapman v. Emeric*, 3 Cal. 273.

9. Where the defendant held as tenant under J. S., in his lifetime, under whom, as heir at law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such: *Held*, that this refusal terminated the tenancy, and overweighed the presumption of a contract between him (defendant) and the plaintiff. *Sampson v. Shaeffer*, 3 Cal. 190.

10. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: *Held*, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 88.

11. At common law, there was no forfeiture of an estate for years for the non-payment of rent, nor for the commission of waste. *Chapman v. Emeric*, 3 Cal. 273.

12. Where V., an owner of land, makes a verbal agreement with B.—which they term a lease—by which B. is to have the land for three years; V. to furnish the farming implements, wagons, horses, and his share of sacks; B. to work all the land, and give V. for use of it one-third of the grain raised, after it is put in sacks, free from the expense of threshing: *Held*, that this agreement is not a lease, but a contract for working the farm upon shares; and that the parties are tenants in common of the grain, until a division be made. *Bernal v. Hovious*, 17 Cal. 541.

13. A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of facts, or by fraud. *McDewitt v. Sullivan*, 8 Cal. P. 592.

[SEC. 14, 1862.\*] The remedy provided for in the preceding section shall not apply as against any person who shall have held the premises demised, leased, or let to him, or to the person under or through whom he holds the possession, for one year, adversely to the right, title, or claim of the landlord or the person under or through whom he claims.

§ 15. Every person summoned as a juror, or subpoenaed as a witness, who shall not appear, or who, appearing, shall refuse to serve or give evidence in any prosecution instituted under this Act, shall forfeit and pay for every such default or refusal, to the use of the county, unless some reasonable cause be assigned, such fine, not exceeding twenty dollars, as the said Justice shall think proper to impose, and execution may issue therefor.

§ 16. [1858.†] If either party shall feel aggrieved by the verdict of the jury or decision of the Justice, he may appeal within ten days, as in other cases tried before Justices of the Peace, and he shall give bond with two or more sufficient sureties, to be approved

\*Statutes of 1862, 421.

†Statutes of 1858, 90.

by said Justice, conditioned to pay all costs of such appeal, and abide the order the Court may make therein, and pay all rent and other damages justly accruing during the pendency of such appeal; and upon the filing of the notice of appeal, and the affidavit of the appellant that the appeal is taken in good faith, and that he intends to perfect said appeal, the Justice shall grant a stay of the writ of restitution, for not exceeding two days, for the purpose of allowing the appellant an opportunity to file his appeal bond, and for no other.

1. If the bond be void or defective through accident or mistake, a new bond may be filed, on such terms as the Court deems just, the right of the other party being regarded. *Rabe v. Hamilton*, 15 Cal. 31.

2. On appeal from a Justice's Court, in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the County Court. *Id.*

3. Bonds on appeal to County Court in forcible entry and detainer cases, are governed by the Act of 1850, concerning such cases, and not by General Act regulating appeals from the judgment of a Justice of the Peace. The Act of 1850 is complete in itself as to the mode of perfecting such appeals; and a bond in such case, with sureties approved by the Justice, is sufficient, though not in double the amount of the judgment, and though no justification of the sureties is annexed. *Kennedy v. Hamer*, 19 Cal. 375.

4. *The People v. Harris*, (9 Cal. 571) when considered in connection with its facts, does not conflict with the decision here. *Id.*

See *ante*, § 348.

5. The Justice is not bound first to make out the papers, and then rely upon his fees being afterwards paid. The payment of fees may be waived, however, by the Justice, or the fees may be paid at any time, so as to bring the case up before the County Court, within the period limited by the rules of that Court. *People v. Harris*, 9 Cal. 573.

6. The six hundred and twenty-seventh section of the Code requires the Justice's fees to be paid before the Justice is required to send up the papers. This provision applies to appeals from Justices' Courts, in cases of forcible entry and detainer. *Id.*

§ 17. [1852.\*] SEC. 1. Upon taking such appeal, all further proceedings in the case shall be thereby stayed, and the Appellate Court, in all cases which are now pending or which may hereafter be brought, shall proceed to try the case anew, and shall issue all necessary writs and process to carry out the provisions of this Act. SEC. 2. All laws or parts of laws which require a statement of the case or evidence, or exceptions to be taken before a Justice of the Peace, on the trial of a case for forcible entry and unlawful detainer, in order to perfect an appeal, are hereby repealed, and the same shall be tried in the Appellate Court, on the evidence introduced before said Appellate Court.

1. The power of the County Court to treble the damages by way of penalty in actions of forcible entry, results by necessary implication from its power to try the case *de novo*. *O'Callaghan v. Booth*, 6 Cal. 63.

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\* Statutes of 1852, 158.

§ 18. If a writ of restitution shall have been issued previous to the taking of the appeal, the Justice shall give the appellant a certificate of the allowance of such appeal; and upon the serving of such certificate upon the officer having such writ of restitution, said officer shall cease all further proceedings by virtue of such writ; and if such writ shall not have been completely executed, the parties in possession shall remain in possession of the premises until the appeal shall be determined.

1. Where a Sheriff refuses to execute the writ on the ground that the premises are in possession of persons not parties to the suit, the Court will award a peremptory *mandamus* against the Sheriff to compel him to execute the writ. *Fremont v. Crippen*, 10 Cal. 211.

2. Where in forcible entry and detainer, plaintiff had judgment in the Justice's Court, and was placed in possession of the land by a writ of restitution, and subsequently, defendant gave bond and appealed to the County Court, where, after trial, there was a verdict for defendant: *Held*, that the County Court had power, after reversing the judgment of the Justice, to award defendant a writ of restitution; that such a writ was necessary to perfect the jurisdiction of that Court over the subject. *Kennedy v. Hamer*, 19 Cal. 375.

3. *Stark v. Barnes*, (4 Cal. 412) does not hold that a party succeeding to the original wrongful possession is liable in action of forcible entry and detainer in the same manner as his predecessor, because there Barnes came in without any new title, and merely succeeded to the claim, and consummated the trespass of the original trespasser. *Id.*

§ 19. In all cases of appeal under this Act, the Appellate Court shall not dismiss or quash the proceedings for want of form, only provided the proceedings have been conducted substantially according to the provisions of this Act.

§ 20. Amendments to the complaint, answer, or summons, in matters of form only, may be allowed by the Court at any time before final judgment, upon such terms as may be just; and all matters of excuse, justification, or avoidance of the allegations in the complaint, may be given in evidence under the answer.

§ 21. The following, or equivalent forms, may be used in proceedings under this Act, to wit:

#### SUMMONS.

The People of the State of California

To the Sheriff or any Constable of the county aforesaid:

Whereas, A. B., of the county of——hath exhibited unto me, a Justice of the Peace for said county, a complaint against C. D., of the county of——for that the said C. D., of the county of——on the——day of——A. D.——at the county of——

(here insert the substance of the complaint with sufficient certainty). You are therefore commanded to summon the said C. D., if he be found in your county, to be and appear before me at my office, (or stating the place) on the——day of——A. D.,——, then and there to make answer unto the complaint aforesaid.

Given under my hand and seal, this——day of——A. D.,

——. E. F., Justice of the Peace.

#### WRIT OF RESTITUTION.

The People of the State of California

To the Sheriff or any Constable of the county aforesaid :

Whereas, A. B., of the county of——at a Court of Inquiry of an unlawful or forcible entry, or unlawful detainer, (as the case may be) held at my office (or state the place) in the county aforesaid, on the——day of——A. D.,——, before me, a Justice of the Peace for the county aforesaid, by the consideration of the Court, hath recovered judgment against C. D., to have restitution of (here describe the premises, as in the complaint). You are therefore commanded that, taking with you the force of the county, if necessary, you cause the said C. D. to be immediately removed from the aforesaid premises, and the said A. B. to have peaceable restitution of the same; and you are also commanded that, of the goods and chattels of the said C. D., within said county, you cause to be made the sum of——dollars, for the said plaintiff, together with the costs of suit endorsed hereon, and make return hereof within thirty days from this date.

Given under my hand, this——day of——A. D.,——.

E. F., Justice of the Peace.

1. The writ of restitution obtained in an action of forcible entry and detainer, does not determine either the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell v. Hagood*, 6 Cal. 148.

2. Where a writ of restitution has been awarded in such case, and the Sheriff refuses to execute the same, on the ground that the mine is in the possession of certain persons not parties to the suit, who claim to hold under the corporation, the Court will award a peremptory *mandamus* against the Sheriff to compel him to execute the writ. *Fremont v. Crippen*, 10 Cal. 211.

# AN ACT

## FOR THE RELIEF OF INSOLVENT DEBTORS AND PROTECTION OF CREDITORS.

[Passed May 4th, 1852 ; took effect June 1st, 1852.]

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- SEC. 1. *Insolvent debtors may be discharged from their debts.  
Jurisdiction of such actions.*
2. *Petition of insolvent.*
  3. *Schedules of his affairs shall be annexed.*
  4. *Signing and verification of schedules.*
  5. *Order to creditors to show cause. Schedules to be certified and filed.*
  6. *Insolvent shall surrender all his property. Exemptions.*
  7. *He shall deliver up all his books and papers.*
  8. *Notice to creditors. Publication of notice.*
  9. *Stay of proceedings. A receiver may be appointed.*
  10. *Meeting of creditors and appointment of assignees.*
  11. *Statement of deliberations of creditors.*
  12. *Bond of assignees.*
  13. *Sale by assignees of insolvent's property.*
  14. *Keeping and distribution of funds. Suits concerning insolvent's estate.*
  15. *Manner of making dividends.*
  16. *Assignees may be required to disclose, if they have funds.*

17. *They may be discharged for a breach of trust.*
18. *If creditors do not attend, the Sheriff, or any creditor, may be appointed assignee.*
19. *Compensation of assignees.*
20. *Opposition of creditors. Charge of fraud shall be tried by a jury.*
21. *The Court shall have the proofs of the parties.*
22. *Insolvent may be examined in writing.*
23. *If guilty of fraud, the debtor shall be debarred the privilege of this Act.*
24. *If not guilty, or if no opposition be made, the debtor shall be released from his debts.*
25. *Additional penalties against fraudulent debtor.*
26. *The Judge may, pending the opposition, approve the appointment of assignees.*
27. *Who considered fraudulent bankrupts.*
28. *Further definition of fraudulent bankrupts.*
29. *Certain persons denied the benefits of this Act.*
30. *Debtors accountable for public funds, bankers and others denied the benefits of this Act.*
31. *So also, if the debtor appropriate any of his effects after filing his schedule.*
32. *Effect of discovery of fraud after the discharge.*
33. *Application under this Act must be personal.*
34. *Title to insolvent's property after surrender, in whom vested.*
35. *Attorney may be appointed for absent creditors.*
36. *Second application under this Act within one year. Mortgages, etc., not affected by proceedings under this Act.*
37. *All property of insolvent shall be delivered to assignee.*
38. *Disbursements made by assignees.*
39. *Assignments must be made under this Act.*

1. Our statute though not strictly speaking a bankrupt law, may be treated as such, or as an insolvent act, or both. *Cohen v. Barrett*, 5 Cal. 195.

2. A discharge under the Insolvent Act, to be a bar to actions on indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law, otherwise it is void. *Meyer v. Kohlman*, 8 Cal. 44; *Johnson v. Atwill*, 9 Id. 477; *McAllister v. Strode*, 7 Id. 428.

§ 1. *Insolvent debtors may be discharged from their debts. Jurisdiction of such actions.*

Every insolvent debtor may be discharged from his debts as hereinafter provided, upon executing an assignment of all his property, real, personal, or mixed, for the benefit of all his creditors, and upon compliance with the several provisions of this Act; provided, said assignment be made *bona fide* and without fraud. The District Court only shall have original jurisdiction in the subject matter herein contained.

1. **Who are insolvent debtors.**—A party whose assets are forty per cent. above his liabilities, cannot be considered insolvent. *Hunt v. His Creditors*, 9 Cal. 45.

2. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at Stockton, claiming that the trees were not paid for, and not subject to W.'s debts, for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State, is in law insolvent, without reference to any property in another State": *Held*, that the proposition is too broadly asserted, even if there were any proof on which it could rest; but in this case there is no proof of the insolvency of W. *Thompson v. Paige*, 16 Cal. 77.

3. **Jurisdiction of proceedings in insolvency.**—Proceedings in insolvency are not *stricti juris* either proceedings in law or equity, but a new remedy or proceeding, created by statute, the administration of which has been vested in the District Courts of this State, independent of their common law, or chancery powers as Courts of general jurisdiction. *Cohen v. Barrett*, 5 Cal. 195.

4. Whenever a new right is created by statute, and the enforcement of such right is committed to a Court, even of original jurisdiction, such Court *quoad hoc* is an inferior Court, and must pursue the statute strictly. *Id.*

5. Assuming that the District Court, in matters of insolvency, is in the exercise of a special jurisdiction, and that the strict rules applicable to such Courts apply, then the Court acquires its power to act by the filing of the petition, or at most, by the petition and notice, and after this, the acts of the Court are proceedings, within the jurisdiction, and not conditions to it. *Brewster v. Ludekins*, 19 Cal. 162.

6. Cases of insolvency under the Act of 1852, are special cases within the meaning of the Constitution. *Harper v. Freelon*, 6 Cal. 76.

7. The Legislature in conferring jurisdiction in these cases on both the District and the County Courts, acted in the exercise of a legitimate power, and these Courts have concurrent jurisdiction. *Id.*

§ 2. *Petition of insolvent.*

[1860.] Such insolvent debtor shall petition the Judge having original jurisdiction within the place of his domicile, or usual residence, which petition shall briefly state the circumstances which compel him to surrender his property to his creditors, and shall conclude with a prayer to make a cession of his estate, and to be discharged from his debts, in pursuance of the provisions of this Act; provided, such insolvent debtor shall have resided within the county where he files his petition, for at least six months next preceding the filing of the same.



1. A joint application of two partners for the benefit of the Insolvent Act is void, there being no authority for such applications in the Act. *Meyer v. Kallham*, 8 Cal. 44.

2. On a petition for a discharge from the debts of the petitioner under the Insolvent Act, it is unnecessary for the petitioner to allege that his debts were created in this State. The Courts do not owe their jurisdiction, in insolvency cases, to an averment in the petition that the debts of the insolvent arose in this State. *Sharp v. His Creditors*, 10 Cal. 418.

3. It is no objection to insolvent proceedings that the petition is addressed to "the Court and not to the Judge." The Court has jurisdiction of the matter, and the words "Judge" and "Court" are in this and other places used as convertible terms. *Brewster v. Ludekins*, 19 Cal. 162.

### § 3. *Schedules of his affairs shall be annexed.*

The debtor shall annex to said petition, his schedule; that is to say, a summary statement of his affairs, with a list of losses he may have sustained, giving the names of his creditors if known; the amount due to each creditor, and the cause and nature of said indebtedness, and when it accrued, and a statement of any existing judgment, mortgage, collateral or other securities for the payment of any such debt; said schedule shall also contain a full, complete, and perfect inventory of all his property, real, personal and mixed, of all choses in action, debts due or to become due, and all moneys on hand of such insolvent; said schedule shall also contain a full statement of all incumbrances existing upon the property of the insolvent. The said debtor shall as nearly as possible estimate the property by him surrendered, and set forth in the schedule, at its true cash value.

1. The petition in insolvency must state the name of each creditor, if known, and if unknown, such fact must be stated. *McAllister v. Strobe*, 7 Cal. 428.

2. If an insolvent does not know the name of the owner of notes executed by him, he must state that circumstance in his schedule. In a suit on the notes, the absence of such statement cannot be obviated by proof at the trial. *Judson v. Atwill*, 9 Cal. 477.

3. Where the schedule of "losses," after specifying certain bad debts, states that petitioner "has lost large amounts by other bad debts, as well as by the depreciated condition of business, high rates of interest, and heavy expenses, as mentioned in the petition herewith filed:" *Held*, that the schedule is not fatally defective as not giving a list of losses. *Brewster v. Ludekins*, 19 Cal. 162.

### § 4. *Signing and verification of schedules.*

The said schedule shall be signed by the debtor, and be by him sworn to before the Judge having jurisdiction of the failure, in the following words, to wit: "I, (A. B.) do in the presence of Almighty God truly and solemnly swear, that the schedule now delivered by me, doth contain a full, perfect and true discovery of all the estate, real, personal and mixed, goods and effects, to me in any way

belonging; all such debts as are to me owing, or to any person, or persons in trust for me, and all securities and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me, or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock or estate, reversion or expectancy, besides that set forth in my schedule; that I have in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; that I have not directly nor indirectly sold, or otherwise disposed of in trust, or concealed any part of my property, effects or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive, or to expect any profit or advantage therefrom, or to defraud, or deceive any creditor to whom I am indebted, in any manner whatever, 'So help me God.'"

1. Where an insolvent's schedule consisted of three lists annexed in order to his petition, one of liabilities, one of assets, one of losses, the latter only of which was signed by him: *Held*, that this is a sufficient signing of the schedule to protect the proceedings from attack collaterally. *Brewster v. Ludekins*, 19 Cal. 162.

§ 5. *Order to creditors to show cause. Schedules to be certified and filed.*

The Judge receiving such petition, schedule and affidavit, shall make an order requiring all the creditors of such insolvent to show cause, if they can, why an assignment of the insolvent estate should not be made, and he be discharged from his debts. Said schedule being signed and sworn to by the petitioner, the Judge shall certify the same, and cause it to be filed in the office of the Clerk of the Court in the county where the assignment was made, there to remain for the information of the creditors.

1. The date of the publication of notice to creditors, is the first day on which the notice is published. *Clarke v. Ray*, 6 Cal. 600.

§ 6. *Insolvent shall surrender all his property. Exemptions.*

The insolvent debtor, on a surrender of his property, shall include and set forth in his schedule his whole estate, including the homestead, if any he has, and all such property as may be by law exempt on execution from seizure and forced sale, and it shall be the duty of the Judge having jurisdiction of the failure, to exempt and set apart for the use and benefit of said insolvent, such real and personal property as he is by law authorized to retain to his own use, or that of his family.

1. A schedule attached to such a petition showing a surrender of all the joint property of the partners is not a compliance with the act, which requires a surrender of all the property of the insolvent. *Meyer v. Kohlman*, 8 Cal. 44.

2. A decree in insolvency, discharging the husband, and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not be thus divested, nor was such the intention of our Insolvent Act. *Bowman v. Norton*, 16 Cal. 213.

3. An order of a District Court setting aside the homestead, operates as a protection against other creditors. *Rix v. McHenry and Wife*, 7 Cal. 89.

4. A partial or special assignment is equally void as a general assignment; and being void because it delays and hinders creditors, as well as because it is against the policy of the statute, cannot be cured by the intervention of third parties who voluntarily assume to do that for the indulgent creditors which the debtor himself could not do. *Groschen v. Page*, 6 Cal. 138.

### § 7. *He shall deliver up all his books and papers.*

The insolvent shall either before or on the day appointed for the meeting of the creditors, deliver to the Court all the commercial or other books he may have kept, which books shall be deposited in the Clerk's office of said Court. Said insolvent shall also deliver to the Court, at the same time, all vouchers, notes, bonds, bills, securities, or other evidence of debt, in any manner relating to, or having any bearing upon or connection with, the property surrendered by said debtor; and all such papers or securities shall be deposited in the Clerk's office of said Court, and the Clerk shall hand them over, together with the books of the insolvent, to the assignees who may be appointed.

### § 8. *Notice to creditors. Publication of notice.*

[1860.] The Judge granting the order for a meeting of the creditors, shall direct the Clerk of the Court to issue a notice calling the creditors or [of] the insolvent to be and appear upon a specified day, not less than thirty nor more than forty days from the first publication of such notice, before said Judge, either in chambers or in open Court, as said Judge shall order, to show cause why the prayer of the alleged insolvent should not be granted. Said notice shall be published at least once a week for four successive weeks in a newspaper printed in the county in which the application is made, if there be one; if there be none so published, then in a newspaper published nearest said county.

1. The notice to be given creditors on filing a petition in insolvency is not process; and even if it were process, the fact that it does not run in the name of the People of the State of California is not a fatal error going to the jurisdiction. *Brewster v. Ludwicks*, 19 Cal. 162.

§ 9. *Stay of proceedings. A receiver may be appointed.*

When issuing the order for the meeting of creditors, the Judge shall order that all proceedings against the debtor be stayed; *provided, however*, that the said stay of proceedings shall not prevent the Judge who shall have granted it, from appointing a receiver to take possession of all property of the debtor, for the benefit of all his creditors, if one or more of his creditors, his agent, or attorney in fact, shall apply for such appointment, and swear that he has reason to believe, and does believe, that the debtor may avail himself of the stay of proceedings, and keep his property from his creditors, if no cause sufficient in the judgment of the Court shall have been shown why the debtor should not have the benefit of this act, and shall produce satisfactory proof of the facts on which his affidavit is founded.

1. An order of Court made staying all proceedings against a petitioner under the Insolvent Law for a discharge from his debts, pending his petition, would not prevent the issuance of an execution on a judgment rendered against the petitioner, and a sale of property under the same within the time limited for the lien of said judgment. *Isaac v. Swift*, 10 Cal. 71.

§ 10. *Meeting of creditors, and appointment of assignees.*

At the meeting of creditors, the said creditors, after having certified on oath that their respective claims are legitimate and true, shall proceed to the appointment of one or more assignees, not exceeding three; in appointing assignees, the opinion of the majority of said creditors, in sums or in claims, shall prevail. At such meeting, any creditor may be represented by his duly authorized agent, or attorney in fact.

§ 11. *Statement of deliberations of creditors.*

When the assignee or assignees shall have been duly appointed in the meeting of creditors, and the surrender of the property shall have been duly accepted of, it shall be the duty of said assignees to deposit in the Clerk's office of the Court, who shall have issued the order for a call of the creditors, a certified statement of the deliberations of said creditors, on the appointment of the said assignees.

§ 12. *Board of assignees.*

The Judge shall require from the assignees a bond with one or more good and sufficient sureties, on which bond the parties therein

shall be liable, jointly and severally, for the amount thereof, conditioned for the faithful performance of the duties devolving upon said assignees. The amount of such bond shall be determined by the majority of creditors: should not the creditors so determine, the amount of said bond shall be fixed by the Court having jurisdiction of the failure.

§ 13. *Sale by assignees of insolvent's property.*

The assignees shall apply by petition to the Court, who shall have ordered a meeting of creditors, to be authorized to sell at public auction, and to the best and highest bidder for cash, all the insolvent debtor's property of whatever nature or kind; and said assignees shall give at least twenty days' public notice, in the same manner as notice for a meeting of creditors of all sales of the property of said insolvent, giving at the same time a full description of the property to be disposed of: *provided, however*, that if any of the property surrendered be of a perishable nature, the assignee shall be authorized to sell the same, on giving at least five days' notice of such sale by publication or notice of such sale as in sale on execution.

1. In an assignment for the benefit of creditors, a power to the assignee to sell on credit is presumptive evidence of fraud. *Billings v. Billings*, 2 Cal. 107.

§ 14. *Keeping and distribution of funds. Suits concerning insolvent's estate.*

The assignees shall deposit all funds belonging to the failure in their joint names, so that nothing can be drawn without the consent of all. Said funds shall remain inviolable, and shall never be loaned, used or mixed with the personal affairs of the assignees; and finally the said assignees shall make a distribution of the proceeds of the property of the insolvent, agreeably to the direction of the Court; said assignees may sue and be sued, either as plaintiffs or defendants, in everything which respects the rights and actions which may belong to the insolvent, or which may concern the mass of the creditors. All suits brought against the insolvent anterior to his surrender of property, before the Courts of other counties, shall be transferred to the Court having jurisdiction in the county in which said insolvent shall have presented his schedule, and may be continued in motion and notice against his assignees.

1. Parties appointed as assignees of an insolvent firm, in a proceeding in insolvency which was illegal and void, are merely custodians, receivers, or bailees of the

funds in their hands, by virtue of the order of the Court, and hold it subject to the discretion of the Court. Consequently, when in another proceeding for the protection of the creditors' property instituted by one of the insolvent firm against his partners, in the same Court, an order is made that they pay over the fund to a receiver appointed by the Court, it is no answer or defense that the fund has been attached in their hands in actions brought by the creditors, or that it had been attached in the hands of a former receiver appointed by the same Court from whom they under a like order had received it. *Adams v. Haskell*, 6 Cal. 113.

2. The provisions of the fourteenth section of the Insolvent Act, providing that all suits brought against the insolvent debtor anterior to his surrender of property, shall be transferred to the Court in which said insolvent shall have presented his schedule, does not apply to suits brought for the enforcement of prior liens or mortgages. *Rix v. McHenry*, 7 Cal. 89.

### § 15. *Manner of making dividends.*

Whenever a dividend shall be declared, the assignees shall make out a statement containing the names of the several creditors, mentioning the sums which are due them respectively; and the said statement shall besides contain the *pro rata* sums to be divided among all the creditors. Said assignees shall deposit said statement in the Clerk's office of the Court, who shall order that notice be given to the creditors in the same manner as for the meeting, that they show cause within fifteen days next following the publication, why the said statement should not be accepted, and the distribution made agreeably to its contents.

### § 16. *Assignees may be required to disclose if they have funds.*

Two or more creditors may at any time make a motion to know if the assignees have funds in their hands, and the said assignees shall be required to present their accounts, and if they have funds they shall distribute them without delay.

### § 17. *They may be discharged for a breach of trust.*

Should the assignees refuse or neglect to render their accounts as required by the preceding section, or to pay over a dividend, when they shall have, in the opinion of the Court, sufficient funds for that purpose in their hands, the Court shall immediately discharge such assignees from their trust, and shall have power to appoint others in their place. The assignees so discharged, shall deliver over to those appointed by the Court, all the funds, property, books, vouchers and securities belonging to the insolvent, without charging any commission or expenses thereon, and shall also be condemned to pay to the new assignees, for the benefit of the mass

of the creditors, twenty per cent. in addition to the amount of funds in their hands.

§ 18. *If creditors do not attend, the Sheriff, or any creditor, may be appointed assignee.*

If on the day appointed for the meeting, the creditors, although duly summoned, do not attend, or refuse to appoint one or more assignees, it shall be lawful for the Judge before whom the said meeting may take place, to authorize the Sheriff of the county to receive the surrender of property offered by the debtor, and to perform in every respect the functions of assignee, and for the faithful performance of said trust, he shall be responsible on his official bond: *provided*, that if any of the creditors should choose to take that charge, the Judge shall appoint said creditor for that purpose, upon said creditor giving bond, with good and sufficient security proportioned to the value of the property committed to his charge.

§ 19. *Compensation of assignees.*

The assignees, collectively, shall be entitled to charge and receive for their services, to wit: ten per centum upon a sum not exceeding ten thousand dollars; eight per centum upon sums above ten thousand dollars, and not exceeding thirty thousand dollars; six per centum upon sums above thirty thousand dollars, and not exceeding sixty thousand dollars; and four per centum on all sums exceeding sixty thousand dollars: *provided*, that the said commissions shall be allowed only on such net sums of money as shall actually come to their hands, or be distributed by them. The mass of creditors shall in no manner be liable for the fees of counsel of the insolvent debtor in conducting a surrender of the property.

§ 20. *Opposition of creditors. Charge of fraud shall be tried by a jury.*

That in case after the appointment of said assignees, any one of the creditors of the insolvent debtor should deem necessary to oppose it, on the ground of some fraud having been committed by the said insolvent debtor, or of the appointment not having been legally made, he shall within ten days next following the appointment of said assignees, lay before the Court which has already taken cognizance

of the case, his written opposition, stating specially the several facts of nullity of the said appointment, or of fraud by him alleged against the insolvent debtor, whereupon, in case of accusation of fraud, after having received the said insolvent debtor's answer, the Court shall order a jury to be summoned, of not less than six men, to be summoned in the same manner as juries are summoned in the District Court, for the purpose of deciding on the said accusation.

1. The word "creditors" in the twentieth section, applies to any creditors, whether named in the schedule or not. *Lambert v. Stade*, 4 Cal. 337.

2. Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge, or obtaining his proportion of the assets, whether he be named in the assignment or not. *Id.*

3. Any irregularity in form of the proceedings on the part of the petitioner in insolvency, must be taken advantage of before judgment, by his creditors, who are defendants in the proceeding. If the judgment be not reversed on appeal, it is conclusive between the parties. *Kohlman v. Wright*, 6 Cal. 230.

4. Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared to be merely presumptive evidence of fraud, the jury may find against such presumption. *Billings v. Billings*, 2 Cal. 107.

### § 21. *The Court shall hear the proofs of the parties.*

On the day or at the term appointed in such order, or on any subsequent day or term, the Court shall proceed to hear the proofs and allegations of the parties; and before any other proceedings be had, shall require proof of the publication of the notice as herein provided.

1. The fact that the Court had adjourned, though not for the term, at the time set for hearing the objections of creditors, and that the hearing took place before the Judge, is no objection to the regularity of the proceedings. *Clark v. Ray*, 6 Cal. 600.

2. On the trial of an opposition by creditors to an insolvent's discharge, on the ground of fraud in transferring his property to A, A is a competent witness for the insolvent as against the objection of interest. *Shawl v. His Creditors*, 19 Cal. 597.

3. In such case, the record would not be legal evidence in favor of A in an action by the creditors to recover from him the property obtained from the insolvent. *Id.*

### § 22. *Insolvent may be examined in writing.*

Upon such an accusation of fraud, the creditor who shall have brought the same shall have the right to interrogate the insolvent debtor on oath, and put to him such written questions, as to the state of his affairs, and the several transactions in which he may have been engaged anterior to his failure, as he shall think proper; and the insolvent shall answer, in writing, to the said interrogatories, in a pertinent and distinct manner; and every equivocal answer on his part shall be construed against him.



§ 23. *If guilty of fraud, debtor shall be debarred the privileges of this act.*

If the jury summoned for the purpose of deciding on the accusation of fraud, brought against such insolvent debtor, declare in their verdict that said insolvent has been guilty of fraud, the said debtor shall forever be deprived of the benefit of the laws passed for the relief of insolvent debtors in this State.

1. The Supreme Court has jurisdiction to hear and determine appeals from the judgment of a County Court, on questions of fraud made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

§ 24. *If not guilty, or if no opposition be made, the debtor shall be released from his debts.*

[1860.] If the accusation of fraud brought against the debtor is declared to be ill-founded, or if there be no opposition to the surrender of his property, and provided said surrender has been made according to the provisions of this act, said debtor shall be released and fully discharged from any and all debts until then contracted, and contracted after the passage of this act, and from every judicial proceeding relative to the same; *provided*, always, that the release and discharge authorized by this section shall not apply to debts and liabilities not mentioned and set forth in the schedule, \*unless the insolvent shall declare in his petition that it is his desire to be discharged from all his debts and liabilities, and that he has described them according to the best of his knowledge and recollection; in which case the discharge and release authorized by this section shall embrace all his debts and liabilities, notwithstanding they may have been imperfectly described, or not described at all.

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\*The remaining portion of this section was added by the amendment of 1860. The following decisions are applicable to discharges obtained previously to the passage of that amendment.

1. Where an insolvent was liable on a note made by S to him, and by him indorsed to R, and by him over to M, and describes the same in his schedule, viz.: To R I am contingently liable for one thousand dollars, and interest, as indorser for one S upon a promissory note made and executed by said S to said R: *Held*, that the description was insufficient for accuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strobe*, 7 Cal. 428.

2. Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwell*, 9 Cal. 477.

3. A defective statement in the schedule of an insolvent of certain promissory notes which constitute a portion of his debts and liabilities, does not invalidate the entire proceedings. If the statute, as to the particularity with which debts and liabilities are required to be set forth by the insolvent, is not substantially complied with, a creditor cannot be prejudiced by the decree of discharge in any suit which he may institute to enforce his claim. *Sade v. His Creditors*, 10 Cal. 488.

4. A note for five hundred dollars by an insolvent to the order of Alfred McCarty, is insuffi-

1. An insolvent's discharge must be, by a judgment of the Court, entered in the same county in which the proceeding is instituted. A discharge made by a District Judge in chambers, in the same district but in another county, is void. *Turner v. McIlhenny*, 6 Cal. 287.

2. A discharge in insolvency of a debt is equally a discharge of a judgment on that debt, and the costs, rendered between the time of filing the petition and schedule and the time of final discharge; the judgment is simply the original debt in a new form. *Finlay v. Carpentier*, 14 Cal. 173.

3. Relief against such judgment may be by motion to discharge it, unless there be suspicion of fraud in the release of the insolvent. Even if fraud be alleged in answer to the motion, the Court can frame issues, and try and determine the same with or without a jury. No formal action is necessary. *Id.*

4. Relief in such case may also be granted by a perpetual stay of execution, or by setting it aside, or by any other order requisite to protect the rights of the parties. The remedy at law being ample, equity will not aid. *Id.*

5. The mere right of discharge is not the only relief resulting to the debtor; exemption from arrest upon *mesne* or final process, as well as from the costs and expenses of harassing litigation, is a portion of the relief. *Cohen v. Barrett*, 5 Cal. 195.

6. An insolvent entitled to his discharge may waive it, and need not prosecute his rights further than a distribution of his property. *Cheever v. Hays*, 3 Cal. 471.

7. **Effect of discharge on mortgage securities.**—Where the estate of an insolvent is subject to liens or mortgages created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus. *Rix v. McHenry*, 7 Cal. 89.

8. A decree of discharge under the Insolvent Act from the payment of a note secured by mortgage, does not release the lien of the mortgage; it only operates to limit the recovery of the mortgagee to the proceeds of the mortgaged premises. *Luning v. Brady*, 10 Cal. 265.

9. **Recovery on subsequent promise.**—Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced; the debt being a sufficient consideration to support the subsequent promise. *Feeny v. Duly*, 8 Cal. 84.

10. As to pleading, where plaintiff relies on a new promise after defendant's discharge in insolvency, see *Smith v. Richmond*, 19 Cal. 476.

11. **Evidence of discharge.**—Where, to suit for goods sold and delivered, defendant pleads his discharge in insolvency: *Held*, that in support of his plea he can offer in evidence certified copies of the decree and of each of the papers composing the record of the insolvent proceedings *separately*; and that these papers need not all be attached together, and the whole certified as one record. *Goldstone v. Davidson*, 18 Cal. 41.

### § 25. Additional penalties against fraudulent debtors.

Any insolvent debtor who shall be found guilty of fraud as afore-

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cently described where the schedule simply states, "Alfred McCarthy, borrowed money, April, 1855, \$500," and a discharge in such case is no bar to a suit on the note. *McCarthy v. Christie*, 13 Cal. 79.

5. The answer to a suit on a note set up defendant's discharge in insolvency. Plaintiff demurred to the answer on the ground that it did not allege that the note was described, set forth, or included in defendant's schedule: *Held*, that the demurrer was not well taken; that under section fifty-nine of the Practice Act, it was sufficient to allege in the answer that a judgment had been duly rendered discharging defendant from the demand sued on, and that whether the demand were sufficiently described was matter of evidence to be determined at the trial by inspection of the record. *Hanscom v. Tower*, 17 Cal. 518.

6. Where an insolvent's schedule described a debt as a note of a certain tenor in suit in a certain Court, when in fact the debt had passed into judgment a short time before the filing of the insolvent's petition: *Held*, that the variance is not fatal; that a mistake as to the condition of the insolvent's indebtedness, as whether reduced to judgment or not, is not material, if the indebtedness be so described as to enable the holder readily to identify it. *Drusster v. Ludkins*, 19 Cal. 162.

said, shall forever be deemed incapable of holding any office of trust or profit under the Government of this State, shall moreover be liable to be prosecuted and punished as a perjurer, if he should be convicted of having foresworn himself in any of the declarations he may have made agreeably to the provisions of this Act, and if convicted of fraud he shall be sentenced by the Court to suffer imprisonment at hard labor in the State prison, for a term not less than six months, nor more than two years.

§ 26. *The Judge may, pending the opposition, approve the appointment of assignees.*

If the Judge before whom the accusation of fraud is brought, or an opposition to the appointment of assignees is made, thinks that the interest of the mass of creditors of the insolvent may suffer by a delay of the approval of the appointment of the assignees, it shall be lawful for said Judge, all opposition notwithstanding, to approve previously the said appointment, if he finds that it has been made agreeably to law.

§ 27. *Who considered fraudulent bankrupts.*

That all persons shall be considered as fraudulent bankrupts, who shall be convicted of having concealed their property with the intention to keep it from their creditors, as also those who shall be convicted of having concealed or altered their books, or papers, with the same intention.

1. The question of fraudulent interest, is a question of fact. *Billings v. Billings*, 2 Cal. 107.

2. Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be put aside; but where the facts are declared merely presumptive evidence of fraud, the jury may find against such presumption. *Id.*

§ 28. *Further definition of fraudulent bankrupts.*

That every insolvent debtor shall also be considered as a fraudulent bankrupt who shall be convicted of having passed sham deeds for the purpose of conveying the whole or any part of his property, and depriving his creditors thereof, or of having knowingly omitted to declare any of his property, rights, or claims in his schedule, or of having purloined his books, or any of them, or of having altered, changed, or made them anew, to an intent to defraud his creditors, or of having alienated, mortgaged or pledged any of his property,

or of having committed any other kind of fraud to the prejudice of his creditors.

1. Where G. & Co. concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes, B. apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, obtained by an arrangement with G. & Co., an *ante*-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by attachment, and a levy made upon the property of G. & Co.: *Held*, that B.'s attachment and claim was valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Brewster v. Bours*, 8 Cal. 501.

2. Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule: *Held*, that it was error for the Court to instruct the jury "that to find the charge of fraud sustained, they must believe the deed made with the intent to defraud, hinder, or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. The fraud is as complete without the delivery as with it. *Fisk v. His Creditors*, 12 Cal. 281.

### § 29. *Certain persons denied the benefits of this Act.*

If any debtor shall be convicted of having at any time within three months next preceding his failure, sold, engaged, or mortgaged any of his goods and effects, or of having otherwise assigned, transferred, or disposed of the same, or any part thereof, or confessed judgment in order to give a preference to one or more of his creditors over the others, whereby to receive any advantages in anticipation of his failure, to the prejudice of his creditors, he shall be debarred the benefit of this Act.

1. Where a debtor who was at the time insolvent, executed a mortgage of all his property, and effects to certain specified creditors, to secure his indebtedness to them, and to protect them from liabilities incurred by their endorsement of his paper: *Held*, that the mortgage was not an assignment, either within the letter or spirit of the twenty-ninth section of the Act for the Relief of Insolvent Debtors, and Protection of Creditors, and did not create a trust for the use of the mortgagor, prohibited by the statute of frauds. *Dana v. Stanfords*, 10 Cal. 269.

2. It was never intended to prevent an insolvent debtor from transferring his property directly to his creditor, either absolutely in payment of his debts, or as security by way of mortgage. *Id.*

3. A conveyance giving a preference is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts. To avoid the conveyance, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of satisfaction of their own equally meritorious claims. *Id.*

4. There is no rule of law which prevents a debtor, in insolvent circumstances, from the application of his property to the payment of one debt rather than another. *Randall v. Buffington*, 10 Cal. 491.

5. But an assignment for the benefit of certain parties who have undertaken to guaranty the payment of such creditors of the assignor as consent to an extension of time or substitution of security, is void. *Groschen v. Page*, 6 Cal. 138.

6. A party about to fail can assign a bill of lading of goods to arrive, not yet paid for, to another, in trust, to devote the proceeds to the payment of the vendor,

and such assignment is good against attaching creditors. *Le Cacheux v. Cutler*, 6 Cal. 514.

§ 30. *Persons accountable for public funds, bankers and others. denied the benefits of this act.*

[1858.] All insolvent debtors owing, or accountable in any manner for public funds or property of whatever nature or kind ; all unfaithful depositaries ; all such as refuse or neglect to pay up all funds received by them as bankers, brokers, commission merchants, or for money, goods, or effects received by them in a fiduciary capacity, shall be denied the benefit of this act ; *provided*, that such parties may avail themselves of this act for the purpose of procuring an equal distribution of their assets among their creditors, and for that purpose only said act shall apply to estates of such insolvents in this section mentioned ; *and, provided further*, such debtor may be discharged from all debts not named in this section.

1. An insolvent banker cannot obtain a discharge from any of his debts. *Cheever v. Hayes*, 3 Cal. 471.

2. Where the petition of the insolvent shows upon its face that a portion of the indebtedness from which he seeks to be discharged has been contracted as a banker, the Court has no jurisdiction of the proceedings. *Cohen v. Barrett*, 5 Cal. 195.

3. The statute denies the benefit of the act to those insolvents who have been guilty of fraud ; and in such cases the Courts would be bound to take jurisdiction, if not appearing upon the face of the proceedings, that the party had been guilty of any act which would prevent such jurisdiction from attaching ; and having once obtained possession of the whole fund, it would be competent for a Court of Chancery to proceed and distribute, even if it should afterwards appear, in the course of judicial investigation, that the insolvent had been guilty of some act which prevented his discharge. *Id.*

4. The petition in insolvency need not aver that the debts were not fiduciary, etc., so as to show that petition is not within the thirtieth section of the Insolvent Act. *Brewster v. Ludekins*, 19 Cal. 162.

§ 31. *So, also, if the debtor appropriate any of his effects after filing schedule.*

If, after the presentation of his petition, the insolvent shall sell, or in any manner transfer or assign any of his property, or collect any debts due him, and shall not give a just and true account of the property so sold or transferred, and the moneys so collected, and pay the same over to the assignees, within ten days after their appointment, said debtor shall not receive the benefit of this act.

§ 32. *Effect of discovery of fraud after discharge.*

Whenever any insolvent debtor has had the benefit of this act, if thereafter at any time it is made to appear that he has concealed

any part of his property or estate, or given a false schedule, or committed any fraud under the provisions of this act, it is hereby declared that he has forfeited all benefit and advantage which he would otherwise have had by virtue of this act, and he cannot avail himself of any of its provisions, in bar to any claim that may be instituted against him.

§ 33. *Application under this act must be personal.*

No person can apply for, or receive the benefit of this act, through an agent or attorney in fact.

1. An insolvent's petition may be signed by an attorney. The signature of the insolvent is not requisite; the thirty-third section of the statute does not touch this point. *Brewster v. Ludekins*, 19 Cal. 162.

§ 34. *Title to insolvent's property after surrender, in whom vested.*

From and after the surrender of the property of the insolvent debtor, all property of such insolvent shall be fully vested in his assignee or assignees, for the benefit of his creditors, and shall not be liable to be seized, attached, taken, or levied on, by virtue of any execution issued against the property of said insolvent; and the assignees who may be appointed shall take possession of, and be entitled to claim and recover all the said property, and to administer and sell the same, as herein provided.

1. After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the Court, and a creditor cannot, after such filing, certainly not after the order staying proceedings, seize the property. The order operates by its own force, and no notice need be given of it to a Sheriff with a writ against the insolvent. *Taffis v. Manlove*, 14 Cal. 47.

2. Attachment issues against H, and the Sheriff proceeds with the writ to his store, which is locked and fastened, front and rear, by iron shutters. The Sheriff, with his deputy, stands at the doors guarding all entrance. H now files his petition and schedule in insolvency, and the usual order of stay of proceedings is made. The Sheriff threatens to break open the store, when H gives him the key, and he enters and levies: *Held*, that the Sheriff had no right to levy, and that the property vested in the assignee of the insolvent subsequently appointed, by relation, from the filing of the petition and schedule. *Id.*

3. To constitute an assignment within the Insolvent Law, there must be a trust in favor of the assignor, or third person. *Wellington v. Sedgwick*, 12 Cal. 469.

§ 35. *Attorney may be appointed for absent creditors.*

If there be any creditors residing without the limits of this State, the Judge shall appoint an attorney to represent them; but the fees of said attorney shall in no case be paid by the mass of creditors, but shall be levied on the amount of the sums which shall be recov-

ered for the account of such non-resident creditors, at the rate of ten per centum: *provided*, that in no case shall the whole fees allowed to counsel appointed on behalf of said creditors, exceed the sum of three hundred and fifty dollars.

1. Where an insolvent's schedule shows that one of his creditors resides out of this State at the time the proceedings in insolvency are instituted, an attorney must be appointed to represent such creditor, or the discharge will, as to him, be *coram non judice*; and the fact of such appointment is a jurisdictional fact, must appear in the record, and cannot be shown by evidence, *aliunde*. *Hanscom v. Tower*, 17 Cal. 518.

§ 36. *Second application under this act within one year. Mortgages, etc., not affected by proceedings under this act.*

In case the debtor who applies for the benefit of this act should have no property to surrender to his creditors, or if the appraised value of the property exhibited in his schedule should not amount to more than one-third of his debts, in case he should already have received the benefit of this act, during the year next preceding, the Judge before whom application is made shall not admit him to the benefit of this law, unless it be proven to the said Judge, by affidavit sworn and subscribed to by two credible and disinterested witnesses, that the debtor has really experienced the losses by him stated, and that the said losses may have reduced him to the situation in which he finds himself; *provided*, all legal mortgages and liens *bona fide* existing on such property at the time of the surrender, as aforesaid, shall remain good and valid, and may be enforced in the same manner as though no such surrender had been made.

§ 37. *All property of insolvent shall be delivered to assignee.*

All the goods, titles and claims which the insolvent debtor shall have declared in his schedule, shall be delivered up to the assignees as soon as they shall have been appointed; and in case the debtor should refuse to deliver up the goods, titles, effects or estates in his possession, the Judge shall oblige to that delivery, either by ordering the Sheriff to seize the said property, to be by him delivered up to the assignees, or causing the said insolvent to be imprisoned until the said delivery shall be effected.

§ 38. *Disbursements made by assignees.*

The assignee or assignees appointed under this act, shall make out a true account of all disbursements made by them in discharge

of their duties as assignee or assignees, which shall be verified by the oath of such assignee or assignees, and shall deliver the same to the Judge having jurisdiction of the subject matter ; and such Judge shall in writing certify such part or parts of the same as he shall deem to be just, and necessarily expended by said assignee or assignees in the discharge of their duty, which amount so allowed shall be paid out of the property of such insolvent debtor.

1. Receivers or other custodians of money in the hands of a Court, are entitled to the protection of the Court against all disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified and sustained in expending. *Adams v. Haskell*, 6 Cal. 477.

§ 39. *Assignments must be made under this act.*

No assignment of any insolvent debtor, otherwise than is provided in this act, shall be legal or binding upon creditors.

1. A voluntary assignment executed for the benefit of creditors is void if not made in conformity to the Statute of May 4th, 1852, entitled, "An Act for the Relief of Insolvent Debtors and Protection of Creditors." *Cheever v. Hays*, 3 Cal. 471.

2. The object of this section was to do away with all voluntary assignments made by a debtor in failing circumstances. It was never intended to prevent an insolvent debtor from transferring his property directly to his creditor, either absolutely or in payment of debts, or as security by way of mortgage. *Dana v. Stanfords*, 10 Cal. 269.

3. An assignment of property to a creditor to be sold at public auction, and the proceeds to be applied, first, in payment of the claim of such creditor, and second, the residue to be distributed *pro rata* among the creditors of such debtor, is not in contravention of the statute which prohibits assignments by insolvent debtors for the benefit of creditors. *Morgenthau v. Harris*, 12 Cal. 245.

4. If such creditor were insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact ; the insolvency could not be presumed from the language of the assignment. *Id.*

5. To constitute an assignment void within the Insolvent Law, there must be a trust in favor of the assignor or third persons. *Wellington v. Sedgwick*, 12 Cal. 474.

6. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing at the time in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the *lex loci*; and his title will be maintained here against execution creditors of the assignor. Such an assignment is not void as contravening our Insolvent Law. *Forbes v. Scannell*, 13 Cal. 276.

7. Assignments of personal property in China, made there between citizens of the United States resident there, will be tested by the Common Law. *Id.*





# RULES OF THE SUPREME COURT

## OF CALIFORNIA.

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I. Applicants for license to practice as attorneys and counselors will be examined in open Court on the first day of each term.

II. In all cases where an appeal is perfected and the statement settled (if there be one) twenty days before the commencement of the next succeeding term, the transcript of the record shall be filed on or before the first day of such term.

III. If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion, during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final, and a bar to any other appeal in the same cause.

IV. On such motion there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the time when the appeal was perfected and statement settled (if there be one); and also, that the appellant has received the transcript, or that he has not directed a transcript of the record to be made out, or if he has given such direction, that he has not tendered the fees therefor.

V. All transcripts of records hereafter sent to this Court, unless printed, shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and a half inches wide at the top, bottom, and side, of each page. and all pleadings, proceedings and evidence shall be chronologically arranged.

VI. The pages of the transcript shall be numbered, and shall be written only upon one side.

VII. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have at least one blank or fly-sheet cover.

VIII. Marginal notes of each separate paper, order or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

IX. The transcript shall be fastened together by ribbon or tape, so that the same may be secured, and every part conveniently read.

X. The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

XI. No transcript which fails to conform to these rules shall be received or filed by the Clerk, unless the transcript be printed. Parties may file printed transcripts. The printing, in such cases, must be on white foolscap paper, at least twelve inches in length and six inches in width.

XII. For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper Clerk certify to this Court the whole or part of the record, as may be required. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

XIII. Exceptions to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed ; and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such case the objection must be presented to the Court before the argument on the merits.

XIV. Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

XV. The calendar of each term shall consist only of those causes in which the transcript shall have been filed five days before the commencement of the term, unless by written consent of the parties ; provided, that all cases in which the appeal is perfected and the statement settled, as provided in Rule Second, and the transcript is not filed five days before the first day of the term, may be placed on the calendar on motion of the respondent, upon the filing of the transcript.

XVI. Causes from the same Judicial District shall be placed together, and all the causes shall be set on the calendar in the order of the several Districts, commencing with the first, except that the calendar shall end with the Sacramento causes, preceded by those from San Francisco, and except also that causes in which the people of the State are a party shall be placed at the head of the calendar.

XVII. Before the argument, both the appellant and the respondent shall furnish to each other and to each of the Justices of the Court a copy of his points and authorities ; or either party may file one copy thereof with the Clerk, who shall cause the copies to be made for the use of the Court, and may tax the same in his bill of costs.

XVIII. A list of the authorities to be used on the argument of any cause shall, if applied for, be furnished to the counsel of the adverse party one day before the hearing.

XIX. No more than two counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the Court below, may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument. Each counsel will be allowed one hour.

XX. All opinions delivered by the Court shall, after the expiration of twenty days from the time they are delivered, be recorded by the Clerk, who shall, after recording the same, deliver the originals, with a transcript of the judgment, order or decree of the Court, to the Reporter.

XXI. The Clerk shall allow the Reporter to take the opinions, the transcripts and briefs in the cases; but not more than five transcripts shall be taken from his office at the same time, and for each transcript taken the Clerk shall require a receipt from the Reporter. The Reporter may retain the transcripts, subject to the order of the Court, or of one of the Justices, so long as it may be necessary to enable him to report the decisions properly.

XXII. All motions for a rehearing shall be upon petition in writing presented within ten days after the judgment is rendered, or order made, except in cases from the First and Second Judicial Districts, in which the petition shall be presented within twenty days after the judgment or order. No argument will be heard upon the petition, nor shall the petition operate as a stay of proceedings without the order of the Court or of one of the Justices.

XXIII. No remittitur to the Court below shall issue until after the expiration of the time allowed by the last rule to file a petition for rehearing, unless upon good cause shown, after notice to the opposite party, or by written consent of the parties, filed with the Clerk.

XXIV. On a rehearing, in cases hereafter arising, in which one of the Justices is disqualified from acting, if the decree, judgment or order of the Court, as to which a rehearing is granted, be not in the opinion of both of the other Justices erroneous, the same shall stand.

XXV. Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted with the remittitur to the Court below.

XXVI. No paper shall be taken from the Court room, or Clerk's office, except by order of the Court or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent of the parties, to be filed with the Clerk.

XXVII. No writ of error or of certiorari shall be issued, except upon order of one of the Justices upon petition, showing a proper case for the issuance of the same.

XXVIII. When a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the Clerk of the Court below, and upon giving notice thereof in writing to the opposite party or his attorney, and to the Sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

XXIX. The writ of error shall be returnable within thirty days, unless otherwise specially directed.

XXX. The rules and practice of this Court respecting appeals shall apply so far as the same may be applicable to proceedings upon a writ of error.

XXXI. The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree, which is sought to be reviewed, except under special circumstances.

XXXII. When causes are placed upon the calendar, parties shall be primarily liable for costs as follows: 1. If by the appel-

lant, he shall first be liable. 2. If by the respondent, or by consent, then both parties. In no civil case shall the Clerk be required to remit the final papers until the costs are paid.

It is ordered that the foregoing be adopted, and that all former Rules be abolished.

JANUARY 6th, 1862.

A true copy.

F. F. FARGO, *Clerk.*

# INDEX.

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[THE NUMBERS REFER TO SECTIONS.]

- ABATEMENT AND REVIVOR.** See **ACTION**, 16.  
action shall not abate by death or other disability, 16.  
or by transfers of interest therein, etc., 16.  
action may be continued by or against representatives, when, 16.  
in the name of the original party, when, 16.  
transferee may be substituted, when, 16.  
abatement of nuisance or waste, 249-252.
- ABSENCE**, of defendant's attorney to appear, 31.  
waives a jury, when, 179.  
of evidence, when a trial will be postponed, 158.
- ABSENTEE**, attorney may appear for appointment by the Court, 31.  
witness, deposition of, 428-431.  
See **NONRESIDENT**.
- ACCIDENT**, ground for a new trial, when, 193.
- ACCOUNT**, assignee of shall not be a witness, when, 4.  
parties may prove accounts in certain cases, 423.  
assignment of, witness, 4.  
items need not be in pleading, 56.  
copy of may be demanded, 56.  
a further account may be ordered, when, 56.
- ACT**, when this act took effect, 649, 667.
- ACTIONS, CIVIL**, one form of, 1.  
parties. See **PARTIES**, 2.  
questions of fact not in issue may be tried in, 3.  
order for trial, how made, 3.  
shall be prosecuted by real party in interest, 4.  
by an assignee, 4, 5.  
between husband and wife, 7.  
against husband and wife, wife may defend in her own right, 8.  
by guardian for injury or death of his ward, 11.  
by father or mother for injury or death of a child, 11.  
when and when not to abate, 16.  
in case of death, or other disability, action may be continued, 16.  
place of trial, 18-21.  
to be tried where the subject matter is situated, 18.  
to be tried where the cause of action arose, 19.  
to be tried where parties reside, 20.  
place of trial of, may be changed, when, 21. See note \* to § 18.  
how commenced, 22. See note to § 22.  
pendency of, when notice, 27.  
against steamers, vessels and boats, 317-332.



**AMENDMENT**—*Continued.*

to pleadings or proceedings generally, 68.  
 by adding or striking out name of party, 68.  
 by correcting mistakes in name of party, 68.  
 or mistake in any other respect, 68.

See **JUSTICES' COURTS.**

**ANSWER**, waives summons, 22.

when defendant must file, 25.  
 on whom served, 38.  
 may be to part of a complaint, 42.  
 may be joined to a demurrer, 42.  
 to amended complaint, 43.  
 may object to complaint, 44.  
 failure to file, what is deemed to admit, 45.  
 to complaint, 46.  
 may contain several defenses and counter claims, 49.  
 defenses must be separately stated, 49.  
 when containing new matter, 50.  
 when it may be stricken out, 50.  
 to be or not verified, 51, 52.  
 by whom, 51.  
 to complaint on written instrument, 53.  
 copy of instrument in the answer, when to be deemed admissible, 54  
 by whom verified and form of affidavit, 55.  
 who need not verify, 55.  
 irrelevant or redundant matter to be stricken out, 57.  
 when judgment is pleaded, 59.  
 pleading conditions precedent, 60.  
 private statute, how pleaded, 61.  
 in libel and slander suits, 63.  
 when deemed controverted, 65.  
 what are material allegations, 66.  
 demurrer to, 38, 50.  
 may be amended, 67.  
 time for filing may be granted, 68.  
 replevin may issue before, 99.  
 when injunction may issue after filing, 114.  
 judgment on failure to answer, 150.  
 issue of law raised by, 152.  
 issue of fact raised by, 153.  
 in partition suit, 270.  
 of joint defendants, 371.  
 of witness on examination, 408.  
 when it may be stricken out, 409, 420.  
 to mandamus, 471, 476.  
 in cases of contempt, 487.  
 on intervention, 661.

See **JUSTICES' COURTS.**

**APPEAL**, from judgment against vessels, etc., 332.

what is an, 333.  
 who may, 335.  
 time allowed to, and from what it will lie, 336.  
 how made, 337.  
 statement on, how made, 338.  
 failure to make, 339.  
 time to file statement may be enlarged, 340.  
 statement to be agreed upon or settled, 341.  
 statement to be annexed to judgment roll or order, 342.  
 from order of Court, 343.  
 review of intermediate orders on, 344.  
 power of appellate Court, 345.  
 when damages for delay may be given, 345.  
 papers to be furnished by the party appealing, 346.

**APPEAL**—*Continued.*

- when it may be dismissed, 346.
- when it will stay proceedings, 350.
- undertaking on may be dispensed with or modified in certain cases, 353.
- how brought to a hearing, 357.
- from submission of controversy, 379.
- from award on arbitration, 388.
- from writ of certiorari, 465.
- costs of, 509.
- decision to be in writing, 657.
- filing of transcript, rules 2 to 13.
- to Supreme from District Court, when it will lie, 347.
- undertaking on, 348, 351.
- sureties of, 355.
- stays proceedings upon the judgment, when, 356.
- judgment on, shall be certified to Court below, 358.
- how brought to a hearing, 361.
- to Supreme from County Court, when it will lie, 359.
- undertaking on, 360.
- brought to a recovery, how, 361.
- party appealing to furnish papers, 362.
- to District from Probate Court, when it will lie, 363.
- how to be taken, 364.
- how brought to a hearing, 365.
- to County Courts from Justices' and Recorders' Courts, causes may be tried anew, 366. See JUSTICES' COURTS.
- power of appellate Court, 367.
- judgment on, 367.

**APPEARANCE**, of married women, how and when, 7, 8.

- waives summons, 22.
- voluntary appearance equivalent to personal service, 35.
- is enough to authorize issuing a commission, 428, 432.
- what constitutes, 523.
- may be by demurrer or answer, 523.

**APPELLANT**, who is, 335.

- must furnish papers, 346, 362.
- must file and serve statement on appeal, 338.
- failing to file amendment, shall be deemed a waiver, 339.
- must file undertaking, 348.
- when on questions of law alone, 366.
- to file statement of points, rule 17.

**ARBITRATION**, title to real property cannot be submitted to, 380.

- who may agree to, 380.
- submission, how to be made, 381.
- judgment on by stipulation, 382.
- how awards shall be made, 382.
- revocation of submission, 382.
- power of arbitrators, 383.
- award to be in writing, 385.
- award to be filed with Clerk of the Court, 385.
- to constitute judgment, 385.
- order to vacate award, 386.
- rehearing of, 387.
- modification of, 387.
- decision upon motion may be appealed from, 388.
- damages for, 389.
- effects of revocation of, 389.

**ARGUMENT**, case may be reserved for, 198.**ARREST AND BAIL**, action for malicious arrest, with what may be united, 64.

- no person to be arrested in a civil action except as prescribed by the Code, 72.

- in what cases defendant may be arrested, 73.
- from whom order of arrest to be obtained, 74.

**ARREST AND BAIL, Continued.**

- when order of, may be made, 75.
- affidavit to obtain order, what to state, 75.
- affidavit to be filed with Clerk of county, 75.
- undertaking from plaintiff to be given, 75.
- city and county of San Francisco exempt from giving undertakings, note to § 76.
- sureties to answer affidavit, 76.
- undertaking to be filed with the Clerk of the Court, 76.
- order when made, form and return, 77.
- affidavit and order to be delivered to the Sheriff and copy to defendant, 78.
- how made, 79.
- defendant to be discharged on bail or deposit, 80.
- bail, how given, 81.
- bail may be reduced, 97, 98.
- defendant may be arrested by bail, 83.
- exoneration of bail on arrest, 82, 83, 85.
- bail liable on undertaking, 83, 84.
- money deposited to be refunded on giving bail, 93.
- liability of Sheriff on escape or rescue of defendant, 95, 96.
- order of, may be vacated, 97, 98.
- amount of bail on, may be reduced, 98.
- of judgment debtor, 239.
- of person usurping an office or franchise and receiving fees belonging thereto, 311.
- of defaulting witness, 411.
- when witness exonerated from, 415.
- for contempt, when to be made, 482.

See JUSTICES' COURTS; ARREST AND BAIL.

**ASSIGNEE, action by, 4, 5.****ASSIGNOR, when shall not be witness for assignee, 4.****ASSIGNMENT of an account, unliquidated demand or thing in action, 4, 5.**

- of promissory notes or bills, 5.
- not to prejudice any set-off or other defense, 5.
- redemption, to produce copy of, 234.

**ATTACHMENT, in what cases issued, 120.**

- affidavit on, what to show, 121.
- undertaking on, effect of, 122.
- form of writ, and its requirements, 123.
- time and manner of executing writ, 125.
- what may be attached, 124.
- released by undertaking, 123, 136, 137.
- several writs, may be issued at the same time, 123.
- rights and shares in stock of corporation or company subject to, 124.
- of real property standing in name of defendant, 125.
- of real property belonging to defendant standing on records in name of any other person, 125.
- of personal property, 125.
- of stocks and shares therein, 125.
- of debits and credits, 125.
- of credits and personal property in hands of any other person than defendant, 126.
- liability of such person on, 127.
- such person may be examined on oath on, 128.
- Sheriff to make inventory of property and return with writ, 129.
- Court may order property sold under, when it will be to the interest of parties, 654.
- Sheriff may sell perishable property, 130.
- Sheriff may collect debts and credits under an, 130.
- if personal property be claimed by a third person, Sheriff to summon a jury, 131.
- judgment to be satisfied out of property attached, 132.

**ATTACHMENT, Continued.**

whenever judgment is paid, Sheriff shall deliver the remainder of the attached property to defendant, 133.  
 undertaking given to release, may be prosecuted, 134.  
 judgment for defendant on, 135.  
 application for order to discharge, 136, 150.  
 affidavits on above application, 139.  
 discharge of, 136, 138, 140.  
 when Sheriff to return writ of, 141.  
 when to issue against steamers, etc., 321.  
 to be directed to the Sheriff, 323.  
 undertaking on, against steamers, etc., 322.  
 when to be discharged, 327.  
 when not to be discharged, 329.  
 against defaulting witness, 411.  
 when may be issued for contempt, 482.

See JUSTICES' COURTS.

**ATTENDANCE** of witnesses, and their rights and duties, 402-416.

See WITNESS.

**ATTORNEY**, Court to appoint for absent defendant, 31.

for concealed defendant, 31.  
 for nonresident defendant, 31.  
 copy of amendments to complaint to be served on, 43.  
 every pleading to be subscribed by, 51.  
 when to verify pleadings, 55.  
 to state reasons why pleadings are not verified by party, 55.  
 may require Sheriff to take property from defendant in replevin, 101.  
 of plaintiff to notify Sheriff as to credits or other property of defendant in possession of third party in attachment, 126.  
 to be served with notice of appeal, 337.  
 to be served with a copy of statement on appeal, 338.  
 to sign agreed statement on appeal, 341.  
 of plaintiff to make affidavit in proceedings against joint debtors, 370.  
 to verify memorandum of costs, 510.  
 in certain cases not to be a witness, 396.  
 measure and mode of compensation of, 494.  
 when to appear for defendant, 523.  
 what deemed an appearance by, 523.  
 what papers to be served on, 522, 524.  
 how papers served on, 519, 520, 521, 522.  
 admission as, and counselor, rule 1.

See JUSTICES' COURTS.

**ATTORNEY GENERAL**, when prosecuting action on behalf of State, need not verify pleadings, 55.

action for usurpation of office or franchise, to be brought by, 310.  
 where to be brought by, 310.  
 what to state in complaint in such action, 311.

**AUTHORITIES**, copy of, and points, to be furnished Justices Supreme Court before argument on appeal, 357.

copy also furnished to each party by the other, 357.  
 Clerk to make copies in certain cases, 357.

See RULES SUPREME COURT, No. XVII.

**AWARDS**, arbitrators compelled to make, 382.

may be enforced by the Court, 382.  
 to be made by arbitrators on proof, 383.  
 how made, and effect of, 385.  
 may be vacated, 386.  
 grounds for vacating, 386.  
 Court may modify or correct, 387.  
 when award to be modified or corrected, 387.

See ARBITRATION.

**B**

- BAIL** may be given by defendant in arrest, 80, 81.  
 defendant to be discharged on giving bail, 80.  
 may surrender defendant, 82.  
 may arrest defendant for the purpose of surrendering him, 83.  
 when to be charged on undertaking, 83.  
 may be exonerated, 82, 83, 85.  
 when finally charged, 84, 85.  
 justification of, 87.  
 qualifications of, 88.  
 may be examined on oath as to sufficiency, 89.  
 when Sheriff liable as, 95.  
 to be given by defendant usurping office or franchise, and receiving fees therefrom, 311.  
 to be given when party arrested for contempt, to be then discharged, 483.  
     See **JUSTICES' COURTS**; **ARREST**; **UNDERTAKING**.
- BIDDER**, refusing to pay amount bid at execution sale, 224.  
 officer to sell property again to highest, 224.  
 summary judgment against bidder refusing to pay, 224, 225.
- BILL** of items need not be set forth in a pleading, 56.  
 of items to be given opposite party on five days' demand, 56.  
 further, may be ordered, 56.  
 of costs and necessary disbursements, 510.  
     See **ACCOUNT AND AFFIDAVIT**.
- BILLS OF EXCHANGE**, action by assignee, 5.  
 not subject to set-off if assigned before due, 5.  
 persons severally liable upon may be included in the same action, at option of plaintiff, 15.
- BLANK**. See **JUSTICES' COURTS**.
- BOATS**, liability of, 317.  
 action may be brought directly against, 318.  
 in actions against, what complaint shall contain, 319.  
 how summons served in actions against, 320.  
 may be attached, 321.  
 how writ to issue against, 322, 323.  
 how and by whom writ executed, 323, 324.  
 undertaking in attachment against, 322, 323.  
 who may answer or plead in action against, 325.  
 how proceedings conducted in such actions, 326.  
 how attachment may be discharged, 327.  
 how sold under execution, 328.  
 how mariners, etc., may assert their claims against, 329, 330.  
 notice of sale of, what to contain, 331.  
 appeals may be taken from judgments against, 332.  
 who may appeal from such, 332.  
     See **STEAMERS AND VESSELS**.
- BOOK**, "Judgment," 201.  
 judgment in a controversy submitted to the Court to be entered in, 378.  
 judgment on confession to be entered in, 376.  
     See **WRITINGS**.
- BOND**, official, of Sheriff, when liable, 96.  
 when sureties on indemnity liable to Sheriff, 645.  
     See **UNDERTAKING**.
- BOUNDARIES**. See **METES AND BOUNDS**, 58.

**C**

- CALENDAR**, Clerk to enter causes upon, 156.  
 how long causes to remain on, 156.  
 in Supreme Court, see rule 20.
- CAPACITY**, want of, to sue, ground of demurrer, 40.

- CAUSES OF ACTION**, where laid, 18-21.  
 improperly united ground of demurrer, 40.  
 complaint not stating sufficient facts to constitute, is ground of demurrer, 40.  
 what, may be set up as a counter claim, 47.  
 separate defenses to refer to such, as they are intended to answer, 49.  
 when several, may be united, 64.  
 for what, defendant may be arrested, 73.  
 limitation to foreign, 532.
- CERTIFICATE**, of sale under execution of movable personal property, 227.  
 of sale of immovable personal property under execution, 228.  
 of sale of real property under execution, 229.  
 what shall contain, 229.  
 duplicate, to be filed with Recorder, 229.
- CERTIORARI**, writ of, 455-465.  
 what denominated, 455.  
 by what Courts granted, 456.  
 may be issued in vacation, 653.  
 when to be issued, 456.  
 application for to be made on affidavit, 457.  
 Court may require notice of application to be given to adverse party, 457.  
 order to show cause why it should not be allowed granted, 457.  
 writ may issue without notice, 457.  
 to whom directed, 458.  
 how writ returned, 458.  
 what to require, 459.  
 if no stay of proceedings be intended what writ to contain, 460.  
 how to be served, 461.  
 how far review upon this writ to extend, 462.  
 when return is defective, Court may order further return, 463.  
 upon a full return, what to be done, 463.  
 how judgment transmitted to inferior tribunal, 464.  
 what constitutes judgment roll upon, 465.  
 appeal from judgment on may be taken to Supreme Court, 465.  
 same costs allowed as in other appeals, 508.
- CHALLENGE**, to jurors, 161.  
 peremptory, how many allowed, 161.  
 for cause, ground of, 162.  
 for cause, how tried, 163.  
 to jurors in Justices' Courts, 590.  
     See **JUSTICES' COURTS**.
- CHAMBERS**, District Judges may transact business at, sec. 25, p. 551.  
 what may be done at, sec. 25, p. 551.  
 of Justices of Supreme Court, 310.
- CHARGE**, to the jury, what shall state, 165.  
 further charge may be given to jury in presence of parties, 168.
- CHILD**. See **INFANT**.
- CHOSE IN ACTION**. See **THINGS IN ACTION**, 4, 5, 422.  
 assignor of cannot be witness for assignee in certain cases, 4.  
 how assignor may be witness for assignee of, 422.
- CIVIL ACTION**, how commenced, 22-35.  
     See **ACTION**.
- CLAIMS**, what may be united, 64.  
 to recover specific personal property, 64.  
 to recover specific real property, 64.  
 against a trustee, 64.  
 for delivery of personal property, 99-110.  
 by third person in replevin, 109.  
 by third person in attachment, 131.  
 by third person on execution, 218.  
 for an office or franchise, 310-316.  
 of mariner, etc., for wages, 329.  
 how asserted against steamer, etc., 329.

**CLAIMS, Continued.**

action may be brought to determine adverse claim for money or other property, 527.

action brought to determine adverse claim to real property, 254-263.

for partition of real property, 264-309.

See **JUSTICES' COURTS**; **PROPERTY, REAL AND PERSONAL**; **TRUSTEE**; **REPLEVIN**; **COUNTER CLAIMS**.

**CLERGYMAN**, when shall not be a witness, 397.

**CLERK**, shall indorse complaint, 23.

what he shall indorse on complaint, 23.

to certify copy of complaint, 28.

affidavit of arrest to be filed with, 75.

undertaking on arrest to be filed with, 76.

summons to be signed by, 24.

to issue writ of attachment, 121.

to enter dismissal of suit, 148.

to enter default of defendant, 150.

to enter causes upon the calendar, 156.

to call jury and enter consent of parties, 159.

shall record and read verdict, 173.

to enter agreement of reference on the minutes, 182.

to write down exceptions, if required, 189.

to enter judgment, 197.

to keep "Judgment Book," 201.

shall make judgment roll, 203.

how shall keep judgment docket, 205.

to arrange the several dockets, 206.

may issue execution for deficiency in foreclosure suit, 246.

to enter consent of tenant upon the minutes, 290.

to have proceeds of sales belonging to unknown owners invested in his name, 301.

duties of, in regard to investments in his name, 303.

to issue attachment against steamer, boat or vessel, 322.

to appoint referee to try mariner's contested claim, 330.

to annex statement to the judgment roll or order appealed from, 342.

to certify copies of papers on appeal, 346.

to receive on deposit conveyance ordered to be executed by the judgment pending appeal, 351.

to qualify sureties on appeal bond, 353.

of Supreme Court to send *remittitur*, 358.

with whom judgment roll filed to attach *remittitur* to judgment roll, and make entry on the docket, 358.

to enter judgment by confession, 376.

to enter in register the title of case submitted to arbitration, 382.

to enter judgment on award of arbitrators, 385.

to enter judgment on offer to compromise, 390.

may take affidavit, 424.

of foreign Court to certify to signature of Judge, when, 427.

to be served with notice of proceedings to perpetuate testimony, 438.

to have commission returned to, 435.

to transmit to Court a certified copy of the verdict in issue on *mandamus*, 475.

shall include costs in the judgment, 511.

shall keep register of actions, 528.

county, of what Courts shall be Clerk, 644.

to take down testimony when required, 663.

**COGNOVIT**, 390.

**COMMISSION**, to take testimony, 428-444.

to take testimony out of the State, when issued, 432.

by whom issued, and to whom directed, 433.

how testimony to be taken, 434.

interrogatories to be annexed to commission, 434.

may be without written interrogatories by agreement, 434.

**COMMISSION, Continued.**

- what, shall authorize the commissioner to do, 435.
- how forwarded, 435.
- pending trial not to be postponed in certain cases, 346.

See **JUSTICES' COURTS; WITNESS.**

**COMMISSIONER, of this State may take affidavits and depositions, 425.**

- duties of, under commission to take testimony, 435.

**COMPENSATION, between cross demands allowed, 48.**

- to be made in partition of real property, 304.

**COMPLAINT, actions commenced by filing, 22.**

- what Clerk to indorse upon, 23.
- to be answered, 24, 38.
- time in which may be answered, 25.
- to be one of the pleadings, 38.
- what shall contain, 39.
- verification of, 51, 55.
- defendant may demur to, 40.
- grounds of demurrer to, 40.
- demurrer to, to distinctly specify grounds of objection, 41.
- if amended to be filed, 43.
- copy, amendments to, to be served, 43.
- when verified, what answer to contain, 46.
- upon written instrument, 53.
- when need not be verified, 55.
- irrelevant and redundant matter to be stricken out of, 57.
- to describe real property by metes and bounds, 58.
- how judgment pleaded in, 59.
- how condition precedent pleaded in, 60.
- how private statute pleaded in, 61.
- what to contain in an action for libel and slander, 62.
- what causes of action may be united in, 64.
- material allegations in, to be taken as true when not specifically denied, 65.
- may amend, after demurrer, of course, without costs, 67.
- may be amended in other cases upon cause shown, 68.
- to be liberally construed, 70.
- Court may disregard error or defect in, where no substantial right is affected, 71.
- injunction may be granted on, 112, 113.
- what to contain to authorize an injunction, 112.
- must be verified, 113.
- for partition of real property, 265, 267, 273, 275.
- on usurpation of office or franchise, what to contain, 311.
- against steamers, etc., to be verified, 319.
- new, need not be filed against joint debtors, 369.
- of a party refusing to testify, may be stricken out, 420.
- in intervention, 661.
- to be answered as if an original, 661.
- in Recorders' and Mayors' Courts, 636.

See **JUSTICES' COURTS.**

**COMPROMISE, defendant may offer to, 390.**

See **JUSTICES' COURTS.**

**COMPTROLLER, may retain salary of officer in certain cases, 479.****CONCEALMENT, of defendant ground for service by publication, 30.**

- of defendant ground for appointment of attorney to appear for him, 31.
- of property in replevin, what Sheriff to do, 107.

See **JUSTICES' COURTS.**

**CONDITIONS, precedent, performance of, how pleaded, 60.****CONFESSION, of judgment, 374-376.**

See **JUSTICES' COURTS.**

**CONSOLIDATION, of action may be ordered, 526.****CONSTABLE, shall not appear as attorney, 534.**

- summons to be served by, 542.
- may execute final process after term, 615.

See **JUSTICES' COURTS.**



- CONSENT**, to waive jury trial to be in writing, 179.  
**CONSUL**, of United States may take affidavit, 426.  
     certificate of, to foreign record, 451.  
**CONSTRUCTION**, of pleadings to be liberal, 70.  
     of words and Acts, in this Act, 647.  
**CONTEMPT**, witness or party in supplementary proceedings liable to be punished for, 245.  
     disobedience to a subpoena a, 409.  
     of party refusing to be examined, 420.  
     for disobeying order to inspect documents, etc., 446.  
     for disobeying writ of mandate, 479.  
     what acts deemed a, 480. See note to page 457.  
     how punished when committed in Court, 481.  
     how punished when not committed in Court, 482.  
     person in, may be let to bail, 483.  
     Sheriff to keep in custody person arrested for, 484.  
     person in, how may be discharged from arrest, 485.  
     person in, how to be examined, 487.  
     person guilty of, may be fined or imprisoned, 488.  
     for omission to perform an act in the power of a party, ground for imprisonment till act be performed, 489.  
     is also indictable, 490.  
     party attached for, illness of, how to be confined, 492.  
     judgment or order in case of, final and conclusive, 493.  
     punishment for, 493. See JUSTICES' COURTS.  
**CONTINUANCE**, of a cause for absence of evidence, 158.  
     in partition suit, when, 286.  
     of trial, etc., for unreturned commission, 436.  
     examination of witness on, 664.  
     of a cause in forcible entries, p. 338. See JUSTICES' COURTS.  
**CONTRACT**, thing in action not arising out of, assignor not to be witness for assignee, 4.  
     several causes of action on, may be united, 64.  
     attachment may issue in action upon, 120.  
     affidavit to specify that defendant is indebted upon, 121.  
**CONTROL**. See JURISDICTION, 35.  
**CONTROVERSY**, when Court to determine, 17.  
     Court may order third parties brought in, when, 17.  
     may be submitted without action, 377.  
     must appear real, by affidavit, 377.  
     judgment entered as in other cases, 378.  
     judgment to be enforced, 379.  
     judgment subject to appeal, 379.  
     may be submitted to arbitration, 380.  
**CONVERSION**, of money or property ground of arrest, 73.  
     See JUSTICES' COURTS.  
**CONVEYANCES**, in partition to be ordered, 297.  
     to be recorded, 299.  
**CONVICTS**, unless pardoned not to be witnesses, 394.  
     to answer as to previous conviction, 408.  
**COPARTNERS**, may be witnesses on own behalf, 423.  
     may be sued by firm name, 656.  
**COPY**, of written instrument, when deemed admitted, 53.  
     certified, when to be evidence, 447.  
**CORPORATION**, how summons served on, 29.  
     officer of, may verify pleadings, 55.  
     how may be enjoined, 117.  
     rights or shares may be attached, 124.  
     how attachment served on, 125.  
     may be sued by judgment creditor, 244.  
     foreign, may be compelled to give security for costs, 512.  
     See JUSTICES' COURTS.

- CORRECTION**, of a verdict, when allowed, 171.  
of an award, when allowed, 387.
- COSTS**, on nonsuit to be paid by plaintiff, 148.  
on judgment by default, 150.  
when plaintiff shall not recover, 255, 390, 498.  
in partition of real property, 280, 308.  
on usurpation of office or franchise, 316.  
appellate Court may tax, 345.  
on judgment by confession, 376.  
when submission to arbitration revoked, 389.  
after offer to compromise, who shall not recover, 390.  
allowed on writ of mandate, 477.  
prevailing party allowed, 494.  
when allowed to plaintiff of course, 495.  
five per cent. allowed to plaintiff in San Francisco, note to § 495.  
when allowed in only one action, 496.  
when allowed to defendant of course, 497.  
in certain cases to be allowed or not, 498.  
separate defendants may recover, 489.  
on appeal in discretion of Court in certain cases, 500.  
of referees may be agreed upon by parties, 504.  
on postponement of trial, 505.  
in discretion of Court or referee, 505.  
on tender before trial, 506.  
if tender be found true, no costs allowed plaintiff, 506.  
but plaintiff to pay defendant's, 506.  
chargeable against estate, etc., in action prosecuted or defended by administrator, etc., 507.  
on *certiorari* or review, 508.  
on commencement of action, 509.  
on filing notice of appeal, 509.  
memorandum of items of, when delivered to Clerk, 510.  
judgment to include, 511.  
costs to be entered in judgment within two days after they are taxed, 511.  
nonresident to give bonds for, 512-514.  
when execution may issue for, 665.
- See JUSTICES' COURTS.
- COUNTER CLAIM**. See SET-OFF, 46, 47; JUSTICES' COURTS.
- COUNTY**, actions to be tried in which, 18-21.  
offense in two or more counties where tried, 19.  
to be stated on summons, 24.  
to be specified in complaint, 39.
- COUNTY COURT**, to be in each county in State, p. 316.  
terms of, p. 7.  
to hear cases anew on appeal, 366.  
jurisdiction of, on appeal, p. 316.  
original jurisdiction of, p. 317.  
civil actions how commenced in, 22.  
appeal from, 359-365, p. 341.  
appeal to, 366, 624-629.  
power of, 367.
- See APPEAL; JUDGE.
- COUNTY JUDGE**, may order arrest of defendant, 74.  
upon what affidavit, 75.  
shall require undertaking on arrest, 76.  
must indorse allowance on bail bond, 90.  
may grant injunction, 111.  
when it may be granted, 112.  
to require undertaking on injunction, 115.  
may hear defendant before issuing writ, 116.  
not to stop business of a corporation, 117.  
may dissolve injunction, 119.  
may release attachment, 137.

COUNTY JUDGE, *Continued.*

- may order judgment debtor to be examined, 238.
- may appoint referee for the purpose, 238.
- may order arrest of judgment debtor, 239.
- may grant order to survey property in litigation, 258.
- to review judgment of Clerk on mariner's contested claim, 330.
- to enlarge time to file statement on appeal, etc., 340.
- to sign settled statement on appeal, 341.
- to fix the amount of undertaking on appeal in certain cases, 350.
- to qualify sureties on appeal bond, 355.
- may order prisoner to be examined as witness in certain cases, 412.
- may take affidavit, 424.
- may issue commission out of the State, 433.
- may administer oaths, 443.
- may order inspection of writings, 446.
- may grant *certiorari*, 456.
- may issue *mandamus*, 467.

## COURT, may determine controversies, where, 17.

- when, may order parties to be brought in, 17.
- actions, how commenced in, 22.
- to be stated in summons, 24.
- name of, to be stated in the complaint, 39.
- may order bill of items of account, 56.
- takes judicial notice of statutes, 61.
- may allow answer after demurrer, 67.
- may impose terms on amendment, 68.
- may disregard errors and defects in pleadings, 71.
- may order arrest of defendant, 74.
- upon what terms, 75.
- to indorse allowance on bail bond, 90.
- may vacate order of arrest or reduce bail, 97.
- in what cases, 98.
- may grant injunction, 111.
- when, 112.
- not to grant after answer, without notice, 114.
- to restrain defendant till decision, 114.
- to require undertaking, 115.
- may order hearing for injunction, 116.
- only may enjoin corporations, 117.
- may dissolve injunction, 119.
- may order property to be delivered after examination of garnishee, 128.
- may release attachment, 137.
- may order certain things to be deposited, 142.
- may appoint receiver, 143.
- may render a several judgment, 146.
- when, may grant nonsuit, 148.
- may take account after default, 150.
- may appoint referee or jury to take account after default, 150.
- to try issues of law, 154.
- may grant continuance, 158.
- to try challenges for cause, 163.
- may order sick juror to be discharged, 164.
- to charge the jury, 165.
- may order cause to be retried, 169.
- may adjourn in absence of jury, 170.
- may direct sealed verdict, 170.
- may correct verdict, 172.
- may direct jury to find special issues, 175.
- to try issue of fact, 179.
- to decide what is a waiver of jury trial, 179.
- may order reference, 182-184.
- to dispose of objections to referees, 186.
- may grant new trial, 193.

COURT, *Continued.*

- may compel party to satisfy judgment, 208.
- may restrain commission of waste, 235.
- may order judgment debtor to be examined, 238.
- may appoint referee for that purpose, 238.
- may order arrest of judgment debtor, 239.
- may require debtor of judgment debtor to be examined, 241.
- may order debtor to apply the debt to the payment of the judgment, 243.
- may forbid transfer of property of judgment debtor, 244.
- may punish for contempt, 245.
- may decree mortgaged property to be sold, 246.
- to direct payment of surplus money in foreclosure, after sale, 247.
- to order sale of foreclosed property when debt not all due, 248.
- shall give treble damages, when, 251.
- may grant order to enter upon property in dispute to survey, 258.
- may issue commission to take testimony out of the State, 433.
- may grant injunction during foreclosure and after sale before conveyance, 261.
- to order lienholders to be made parties in partition suit, when, 273.
- to appoint referee to try liens, 273.
- to order partition or sale of lands, how and when, 275.
- to confirm or set aside report of referee, and appoint new ones, 278.
- to allow expenses of partition, 280.
- to direct application of proceeds of sale of encumbered property, 283.
- to order distribution, 285.
- to direct terms of sale of property, 288.
- to fix compensation of tenant whose estate has been sold, 291.
- to protect unknown tenants, 292.
- to ascertain and secure value of future contingent or vested interests, 293.
- to order conveyances to be executed, 297.
- to direct investment of proceeds of sale in partition belonging to unknown owners, 303.
- to adjudge compensation, in what cases, 304.
- to direct by whom costs shall be paid, 308.
- may appoint one referee in partition, 309.
- to enlarge time for filing statement, etc., on appeal, 340.
- to sign settled statement on appeal, 341.
- may review intermediate orders on appeal, 344.
- to fix amount of undertaking on appeal in certain cases, 350, 352.
- may modify or dispense with undertaking when the appeal is made by certain persons, 353.
- to qualify sureties on appeal bond, 355.
- may order perishable property to be sold pending appeal, 356.
- to determine controversy submitted without action, 377.
- may compel arbitrator to make award, 382.
- may vacate an award, when, 386.
- may modify or correct, 387.
- to postpone the trial or not in certain cases, 400.
- may order subpoena to be served by the Sheriff, 405.
- may issue warrant for the arrest of disobeying witness, 411.
- may order prisoner to be examined in certain cases, 412.
- may administer oaths, 443.
- may order inspection of writings, 446.
- may grant *certiorari*, 456.
- may issue *mandamus*, 467.
- to hear writ, 470.
- may order jury trial, 472.
- may grant further time to reply in *mandamus*, 476.
- when the answer raises no issue of fact, Court shall proceed to hear application, 476.
- may order reference to assess damages, 477.
- to order peremptory mandate, 477.
- may fine or imprison party refusing to obey *mandamus*, 479.

**COURT, Continued.**

- may punish for contempt summarily, 481.
- to indorse amount of bail on warrant for contempt, 483.
- to hear proceedings for contempt, 487.
- may allow costs, 498.
- may allow costs to defendants in some actions, 499.
- discretionary on costs for appeal, 510.
- may order trustee or administrator to pay costs, 507.
- tax, 507.
- may order undertaking for costs in certain cases, 512.
- See **COUNTY, SUPREME, DISTRICT, PROBATE, JUSTICES', MAYORS' AND RECORDERS' COURTS, AND JUDGE.**
- COURTS OF JUSTICE**, in this State, p. 307.
- COURTS OF SESSIONS**, organic Act, p. 318.
- CREDITS AND DEBTS.** See **DEBTS**, 125, 130, 240.
- CREDITORS**, may redeem, 231.
- CROSS DEMANDS**, what, deemed compensated, 48.
- CUSTOM**, proof of, admitted in certain cases, 651.

**D**

- DAMAGES**, complaint to state amount of, demanded, 39.
  - with what claims for, may be united, 64.
  - after default Court to order, assessed by jury in certain cases, 150.
  - excessive, ground for new trial, 193.
  - treble, allowed in actions of waste, 251.
  - treble, allowed in forcible entry, 253.
  - measure of, in certain cases, ~~552~~ 2 5-2
  - when, set off by improvements, 257.
  - for usurpation of office or franchise, 314.
  - allowed when appeal taken for delay, 345.
  - witness disobeying subpoena liable for, 410.
  - allowed on writ of mandate, 477.
- DAYS**, judicial, what are, p. 570.
- DEATH**, father or mother may maintain action for, of child, 11.
  - guardian for death of ward, 11.
  - action not to abate by, of party, 16.
  - not to prejudice set-off, 48.
  - of defendant, exonerates bail, 85.
  - judgment upon verdict after, 202.
  - on permission of Probate Court execution may issue upon judgment after, 215.
  - deposition may be read after death of witness, 430, 442.
  - substitution in appellate Court after, rule XIV, p. 613.
- DEBTOR**, of defendant to be served with notice in attachment, 126.
  - liability of, after notice, 127.
  - of judgment debtor may pay Sheriff, 240.
  - may deny liability, 271.
  - proceedings against joint, 368-373.
  - judgment, may be examined, 238.
  - third parties may be examined as to property of judgment debtor, 241.
  - See **JOINT DEBTORS.**
- DEBTS AND CREDITS**, how attached, 125.
  - in attachment notice to be given to party owing debts or holding credits, 125.
  - may be levied upon, 217.
  - can be levied upon, when, 130.
  - how levied upon, 130.
  - discharged by the Sheriff's receipt, 130, 240.
- DECISIONS**, in appellate Courts to be in writing, when, 657.
- DEFAULT**, judgment by, when, 150.
  - if against a nonresident, 150.
  - relief not to exceed the demand in complaint, 147.
  - when relief is granted in judgment by, 68.

**DEFAULT, Continued.**

writ of mandate not granted by, 470.

**DEFECT, of parties a ground of demurrer, 40.**

when waived by the defendant in pleadings, 45.

when defective, Court may order further account, 56.

in proceedings, when disregarded by the Court, 71.

**DEFENDANT, is the adverse party, 2.**

who may be made, 13, 14, 658.

several may be joined as, 14.

defense by one or more, 14.

is summoned to appear and answer, 24.

how he may waive summons, 22, 35.

summons, how served upon, 28, 29.

when served by publication of summons, 30.

attorney may be appointed for, 31.

when the action is against several, 32.

may demur or answer, 38.

when he may demur, 40.

may answer, in what time, 25.

may demur and answer at the same time, 42.

may demur to the whole complaint, or to one or more of several causes of action, 42.

answer to amended complaint, when, 43.

may set forth several defenses, 49.

must be separately stated, 49.

his answer, what to contain, 46.

his answer, when to be verified by, 55.

who need not verify, 55.

his signature deemed valid, unless denied by, under oath, 53.

when not personally served may answer in six months, 68.

can be arrested, when, 73.

to be discharged on giving bail or deposit, 80, 81, 91.

may apply for a reduction of bail or delivery from arrest, 97.

to be served with certain papers in replevin, 102.

the effect of his excepting to the sufficiency of the sureties, 103.

the effect of his not excepting to the sufficiency of the sureties, 104.

may be restrained after answer filed, 114.

may be heard before injunction issues, 116.

may move to dissolve injunction, 118.

what papers to be used in the motion, 118.

his property may be attached, 125.

what property may be attached, 124.

how attached, 125.

may have attached property redelivered, 133.

may in attachment have judgment, 135.

may move to discharge attachment, when, 136, 138.

may have nonsuit entered, 148.

judgment against, in default, 150.

may bring issue to trial, 157.

may take a dismissal, 157.

may challenge jurors, 161.

may have peremptory challenge, 161.

may waive trial by jury, 179.

may object to referee, 185.

may move for a new trial, 193.

may bring cause before the Court for argument, 198.

may have judgment, when, 199.

may be a witness, 422, 423.

may be arrested for usurpation of office, 311.

judgment for or against, 312.

to pay damages for usurpation of office, 314.

may be fined, 316.

steamer or boat may be made, 318, 326.

**DEFENDANT, Continued.**

- must verify confession of judgment, 375, 396.
- to recover costs, when, 496.
- to recover costs after tender to plaintiff, 506.
- may demand security for costs in certain cases, 512.
- when he shall be deemed to have appeared, 523.

**DEFENSES, action by assignee without prejudice to, when, 5.**

- when new matter constitutes a, 46.
- defendant may set forth several, 49.
- each, shall be separately stated, 49.
- plaintiff may demur to, 50.
- the Court may strike out sham and irrelevant, 50.
- when deemed genuine and duly executed, 54.
- may state what, in libel and slander, 63.

See JUSTICES' COURTS.

**DELINQUENT, bidder at execution sale, 224, 225.****DELIVERY, of property purchased at execution sale, when, 227.**

- of certificate, when given, 227, 228.
- of certificate, when sufficient to pass property, 228.

**DEMAND, of bill of items, when and how, 56.**

- assignor not a witness for assignee in unliquidated, 4.

**DEMURRER, by defendant, when, 22.**

- waives summons, 22.
- to be filed with the Clerk, 38.
- on whom served, 38.
- is a part of the pleadings, 38.
- to the complaint, when to be filed, 40.
- causes of demurrer, 40.
- to state grounds distinctly, 41.
- to the whole complaint, when, 42.
- may demur to part and answer to part, 42.
- may demur and answer at same time, 42.
- to answer and defenses, when, 50.
- time within which plaintiff may demur, 50.
- after, either party may amend, 67.
- if, to complaint overruled, Court may allow answer to be filed, 67.
- if, to answer overruled, facts alleged considered denied, 67.

See JUSTICES' COURTS.

**DENIAL, of the complaint, when specific, when general, 46.**

- must be verified, or written instruments will be deemed genuine, 53, 54.

**DEPOSIT, made by defendant discharges him from arrest, 80, 91.**

- to be paid into Court by the Sheriff, 92.
- may be withdrawn on giving bail, 93.
- how disposed of after judgment, 94.
- when paid into Court, 142.
- of surplus in Court on foreclosure, when, 247.
- of overplus after sale of steamer, 329.
- must be made, with whom on appeal, 348, 356.
- by defendant on interpleading, 658.

See JUSTICES' COURTS.

**DEPOSITION, when may be taken, 428.**

- affidavit, 429.
- to be read, to whom, signed, sealed, 430.
- how sent, 430.
- may be read after Clerk finishes, 430.
- may be read as evidence at any stage of the same action, 431.
- of witnesses out of the State, when taken, 432.
- may be taken when the trial is postponed, 664.

See JUSTICES' COURTS.

**DEPUTY, Sheriff, service of summons by, 28.**

- Constable, see JUSTICES' COURTS, 613, 614.

**DETAINER, complainant when to recover treble damages for, 253, (see p. 577).****DISABILITY, of a party insufficient to cause abatement, 16.**

- DISBURSEMENTS**, allowed, if necessary, 494.  
to be verified, by whom, 510.
- DISCOVERY**, of new evidence a ground for new trial, 193.  
under oath, how obtained, 417.
- DISMISSAL**, of an action may be taken when, 148.  
either party may take, 157.  
for not giving security for costs, 514.  
of appeal, if the requisite papers are not furnished, 346.  
of appeal from the Probate Court, when, 365.  
See **JUSTICES' COURTS**.
- DISOBEDIENCE**, of a witness to a subpoena, how punished, 406, 410.  
of a peremptory mandate, how punished, 479.  
of any writ, when duly served, a contempt, 480.  
See **JUSTICES' COURTS**.
- DISQUALIFICATION**, grounds of, in Judges, p. 569.  
causes of, in jurors, 162.  
objection to the appointment of referee for, 185.
- DISTRICTS**, how many judicial, p. 546.  
District Courts, terms of, p. 551.  
to have original jurisdiction, 549.  
how civil action commenced in, 22.  
appeals to Supreme Court from, 347, 358.  
Court, costs to be paid to, Judge, 509.  
Judge of, may order arrest of person usurping office, 311.  
Judge of, may order deposition of prisoner to be taken, 412.
- DOCKET**, what entries to be made of judgment, 204.  
what is judgment, 205.  
judgment, may be inspected by public, 206.  
how judgment, may be made a lien on property in another county, 207.  
copy of, on redemption requisite, 234.  
judgment of appellate Court to be entered in, 368.  
See **JUSTICES' COURTS**.
- DOCUMENTS**, Court may order inspection of, 446.  
when evidence of contents of, may be given *aliunde*, 447.  
copy of, when given in evidence, 655.  
See **WRITINGS ; RECORDS**.
- DUCES TECUM**, subpoena may require, 402.  
See **EVIDENCE**.
- DUPLICATE**, of certificate of sale on execution to be recorded, 229.

## E

- EMBASSADOR**, of United States to take affidavit, 426.  
to certify record of foreign Court, 451.
- EMBEZZLEMENT**, of money ground of arrest, 73.  
See **JUSTICES' COURTS**.
- ENTRY**, damages for unlawful, trebled, 253.  
See **FORCIBLE ENTRY AND DETAINER**.
- ERRORS**, when may be disregarded in pleadings, 71.  
in law, at trial, ground for new trial, 193.  
in transcript on appeal, rule XII, p. 612.  
writ of, to Supreme Court, rules XXVII, XXXI, p. 615.
- ESTATE**, for life or years, 282.
- EVIDENCE**, in action for libel or slander, 63.  
postponement of trial on ground of absence of, to be granted only on affidavit, 158.  
newly discovered, ground for new trial, 193.  
also insufficiency, 193.  
of documents, records, etc., 446-453.  
offer to compromise not to be given in, 390.  
deposition to be, 431.  
See **JUSTICES' COURTS**.



**EXCEPTIONS**, may be taken to referee's decision, 187.

what are, and when taken, 188.

point of, to be particularly stated, 189.

to be in writing, 189.

may be in Judge's minutes, 189.

require no particular form, 190.

to be brief, 190.

when decision deemed excepted to, 191.

may be taken to sufficiency of sureties in replevin, 103.

to sufficiency of sureties on appeal, 355.

See **JUSTICES' COURTS**.

**EXCESS**, to be paid to person entitled in foreclosure suit, 247.

defendant to have judgment for, when counter claim exceeds plaintiff's demand, 199.

See **JUSTICES' COURTS**.

**EXECUTION**, for balance in attachment, 133.

may issue within five years, 209.

how to issue, and to whom, 210.

what to require, 210.

in action upon joint contract, 211.

when to be returned, 212.

to enforce judgment, 213.

may issue upon order of Probate Court after death of judgment debtor, 215.

may issue to Sheriff of any county, 216.

what property liable to, 217.

how debts and credits to be subject to, 217.

not to affect property until levy, 217.

claim by third person under, 218.

claim to be determined by Sheriff's jury, 218.

what exempt from, 219.

how writ of, executed, 220.

notice of sale under, 221.

penalty for selling property under, without notice, 222.

how property to be sold under, 223.

against delinquent bidder, 225.

liability of officer in certain cases, 226.

delivery by officer of property purchased under, 227-229.

real property, how redeemed, 230.

who may redeem property sold under, 230.

when sale under, becomes absolute, 232.

proceedings supplementary to, 238-245.

waste may be restrained until execution of conveyance under, 235.

for deficit after foreclosure, 246.

damages for injury to property sold under, to be recovered by purchaser, 262.

against vessels, etc., 328.

against vessels, etc., what to direct, 329.

may issue for costs and damages in *mandamus*, 477.

may issue to recover costs, 665.

See **JUSTICES' COURTS**.

**EXECUTOR**, may sue by himself without joining *cestui que trust*, 6.

See **ADMINISTRATOR**.

**EXEMPTION**, what subject to, from execution, 219.

**EXONERATION**, of bail, what is, 82, 83, 85.

**EXPRESS TRUST**, trustee of, who is, 6.

## F

**FACTS**, to be stated in complaint, 39.

not sufficient, in complaint is ground of demurrer, 40.

objection to want of sufficient, not waived, 45.

trial of question of, not in pleadings, 3.

how issue of, arises, 153.

**FACTS, Continued.**

separate finding of, on decision, 180.  
to be agreed upon, on submission of controversy, 377.

See **ISSUES**.

**FATHER**, may sue for injury or death of child, 11.

**FEES**, of witness to be tendered, 404.

of attorneys, 494.

of referees, 504.

See **COSTS**.

**FELONS**, not to be witnesses, 394.

**FINDINGS**, how given, 180.

**FINES**, of public officers to be stopped in Comptroller's hands, 479.

amount of, for contempt, 493.

amount of, for usurping office, etc., 316.

See **CONTEMPT**; **DISOBEDIENCE**.

**FIRE ENGINES**, exempt from execution, 219.

**FORCIBLE ENTRY AND DETAINER**, Act concerning, p. 577.

See **JUSTICES' COURTS**.

**FOREIGN COURT**, may take affidavit, 426.

**FOREIGNERS**, when witnesses may have interpreter, 401.

may have process, in certain counties, in Spanish, 646.

**FORECLOSURE**, of mortgages, 246-248.

sale of property under, 246.

surplus under, to be paid defendant, 247.

when debt not all due, 248.

only remedy under mortgage, 260.

where action to be brought for, 18.

**FORFEITURE**, a statutory penalty, 19.

action for recovery of, where tried, 19.

**FRANCHISE**, as to usurpation of office, etc., 310-316.

See **OFFICE**.

**FRAUD**, is a ground for arrest, 73.

See **JUSTICES' COURTS**.

**FUTURE**, tense included in present, 647.

**FURNITURE**, what, exempt from execution, 219.

**G**

**GARNISHEE**, may be examined under oath, to furnish memorandum to Sheriff, 129.

Sheriff's receipt to be discharge of, 130.

**GARNISHMENT**. See **ATTACHMENT**; **JUSTICES' COURTS**.

**GUARDIAN**, infant to appear by, 9.

how appointed, 9, 10.

may maintain action for injury or death of ward, 11.

may be sued for committing waste, 250.

in certain cases securities of infants to be in name of, 289.

not to purchase land in partition except for infant's benefit, 295.

proceeds of sale of infant's share in partition to be paid to, 305.

same as to insane person, 305.

may consent to partition in certain cases, 307.

to be appointed by Justice of the Peace in certain cases, 539.

to give his consent in writing, 539.

See **JUSTICES' COURTS**; **INFANTS**.

**H**

**HIGHWAYS**, persons taking wood from, liable for damages, 251.

where timber taken to repair, value to be paid, 252.

**HUSBAND**, when to be joined with wife, 7.

when not to be joined, 7.

not to be witness for or against wife, 395.

## I

**IMMATERIAL MATTER**, may be stricken out, 50.

**INADVERTENCE**, defendant may be relieved from judgment taken through, 63.

**INDIANS**, shall not be witnesses, 394.

**INFANT**, shall sue and appear by guardian, 9.

how guardian appointed for, 9, 10.

how summons served on, 29.

securities of, to be taken by guardian, 289.

guardian to receive proceeds of sale for, 305.

when, cannot be witness, 384.

See **JUSTICES' COURTS**.

**INJUNCTION**, what is an, and how granted, 111.

how enforced, 111.

in what cases granted, 112.

at what time granted, 113.

complaint and affidavits must show grounds for, 113.

what papers to be served with, 113.

not allowed after answer but upon notice, 114.

defendant may be restrained till decision.

undertaking on part of plaintiff, 115.

Court may make order requiring defendant to show cause why writ should not issue, 116.

against corporation, to suspend business of, 117.

motion to dissolve or modify, 118.

when to be dissolved or modified, 119.

**INJURY TO CHARACTER**, action for, and for malicious arrest or prosecution, may be joined, 64.

defendant may be arrested in actions for, 73, 544.

**INSANITY**, service of summons on person of unsound mind, 29, 542.

guardian may receive proceeds of sale on partition, 306.

guardian may consent to partition and execute release, 307.

persons laboring under, cannot be witnesses, 394.

**INSOLVENT DEBTORS**, may be discharged from their debts, p. 593.

jurisdiction of proceedings, p. 593.

petition of, p. 593.

schedule, what to contain, p. 594.

oath, p. 594.

order to creditors to show cause, p. 595.

schedules to be certified and filed, p. 595.

surrender of property of, p. 595.

Judge shall exempt certain property, p. 595.

shall deliver up books and papers, p. 596.

notice to creditors, and publication, p. 596.

stay of proceedings, p. 597.

meeting of creditors and appointment of assignees, p. 597.

statement of deliberations of creditors, p. 597.

assignees shall give bond, p. 597.

sale by assignees of property of, p. 598.

disposition of funds, p. 598.

suits concerning estate of, shall be transferred, p. 598.

manner of making dividends, p. 599.

assignees shall disclose the funds in their possession, p. 599.

assignees may be discharged, p. 599.

Sheriff shall be assignee in absence of creditors, p. 600.

compensation of assignees, p. 600.

creditors may oppose appointment of assignees, p. 600.

charge of fraud to be tried by a jury, p. 600.

the Court shall hear the proofs, p. 601.

may be examined in writing, p. 601.

penalty if found guilty of fraud, pp. 602, 603.

when may be released, p. 602.

assignees may be appointed pending opposition, p. 604.

**INSOLVENT DEBTORS, Continued.**

- who are fraudulent, p. 604.
- who denied the benefits of the act, pp. 605, 606.
- when fraud discovered after discharge, p. 606.
- application cannot be made by attorney, p. 607.
- after surrender, assignee vested with title to effects of, p. 607.
- attorney may be appointed for absent creditors, p. 607.
- second application for discharge, p. 608.
- mortgages and liens not affected, p. 608.
- entire estate to be delivered to assignees, p. 608.
- disbursements by assignees, p. 608.
- assignments not made under this act illegal, p. 609.

**INSTRUCTIONS TO JURY**, what instructions shall state, 165.  
 shall be furnished in writing to either party upon request, 165.  
 additional, may be given after jury have retired, 169.

**INSTRUMENTS IN WRITING**, subpoena may require witness to bring, 402  
 party may be ordered to give inspection and copy of certain, 446.  
 penalty for noncompliance with order, 446.  
 when evidence *aliunde* of contents of, may be given, 447.  
 when altered, party shall account therefor, 448.

**INTEREST**, real party in, to bring action, 4.  
 who may not be witnesses on the ground of, 392.  
 test of, which shall render witness incompetent, 393.  
 on verdict, to be included in judgment, 511.  
 as a disqualification of a person acting as Judge, p. 569.

**INTERPLEADER**, when a party defendant may apply to have a third person substituted in his place, 658.

- application shall be made on affidavit, 658.
- defendant shall deliver the thing in dispute into Court, 658.

**INTERPRETER**, shall be sworn for a witness ignorant of the English language, 401.

**INTERROGATORIES**, direct and cross, may be annexed to commission to take testimony, 434.  
 may be settled by Judge granting commission, 434.  
 witness shall be examined in answer to, 435.

See **WITNESS**.

**INTERVENTION**, definition of, 659.  
 who shall be entitled to make, 659.  
 may take place before or after causes joined, 660.  
 shall be by petition, stating grounds thereof, 661.  
 shall be served on parties to the action, 661.  
 shall be answered as if an original complaint, 661.  
 determination of, and costs thereon, 662.

**IRREGULARITIES IN PROCEEDINGS**, as ground for new trial, 193.  
 purchaser of real property, evicted on account of, may recover price paid, 237.

- on failure to recover, judgment may be revived against debtor, 237.

**IRRELEVANT MATTER**, may be stricken from pleading, 50, 57.

**ISSUES**, of fact not raised by pleadings may be ordered to be tried by jury, 3.  
 defined and classified, 151.  
 of law, when they arise, 152.  
 of law, how disposed of, 154.  
 of fact, when they arise, 153.  
 of fact, how to be disposed of, 155.  
 of fact, decision on, when tried by the Court, 180.  
 of fact, trial by jury may be waived, how, 179.  
 if issues of law and fact, those of law to be first disposed of, 155.  
 reference may be ordered to try all the, 182.  
 causes shall be entered on calendar by date of, 156.  
 to remain on calendar until disposed of, 156.  
 either party may bring issue to trial, 157.  
 trial of, in actions against joint debtors, 373.  
 trial of, in applications for *mandamus*, 472.

ITEMS OF ACCOUNT, need not be set forth in pleadings, 56.  
 party shall after demand give bill of, 56.  
 Court may order a further bill of, 56.

## J

JOINDER, *of parties*, executor, etc., need not join the person for whose benefit the action is brought, 6.

when husband must be joined if a married woman is a party, 7.  
 all parties in interest shall be joined, 12-14.  
 if consent of a plaintiff be not obtained, he shall be made defendant, 14.  
 in questions of general interest, one may represent all, 14.  
 parties severally liable on any instrument may be joined or not, 15.  
*of causes of action*, what causes of action may be joined, 64.

JOINT DEBTORS, proceedings when summons is not served upon all, 32.  
 execution on judgments against, 211.  
 may be summoned to show cause when judgment is not obtained against all, 368.

need not file new complaint, 369.  
 summons, what to contain, 369.  
 summons shall be accompanied by affidavit, 370.  
 answer to such summons, what to contain, 372.  
 Statute of Limitations cannot be set up, 372.  
 issues tried as in other cases, 373.  
 judgment shall be for balance due and interest, 373.

See JUSTICES' COURTS.

JUDGE, particular disqualification of, *q*: 569.

may change the place of trial when he is disqualified, 21.  
 may order further items of an account to be given, 56.  
 may issue order of arrest, 74.  
 exception may be delivered in writing to, 189.  
 may enter exception in minutes, 189.  
 may order judgment debtor to answer concerning his property, 239.  
 may order usurper to be arrested, when, 311.  
 may be a witness for either party, 400.  
 when, may issue subpoena, 403.  
 may make an order that subpoena be served on concealed defendant, 405.  
 may order deposition of prisoner to be taken, 412.  
 deposition may be taken before, 429.  
 may order commission, 433.  
 granting commission, to settle interrogatories in certain cases, 434.  
 to take deposition in proceedings to perpetuate testimony, 439.  
 may administer oaths, 443.

JUDGMENT, when plaintiff may take, 26.

how pleaded, 59.  
 party may be relieved from, in certain cases, 68.  
 not to be reversed for immaterial error in the pleadings, 71.  
 defendant may be arrested any time before, 77.  
 how satisfied in attachment suit, 132.  
 what it is, 144.  
 may be entered at any time, 144.  
 how to be entered where there are several parties, 145, 146.  
 what relief, to grant, 147.  
 of nonsuit where to be entered, 148.  
 when to be on merits, 149.  
 may be given by default, when, 150.  
 to be entered upon decision of Court, 180.  
 may be upon issue of law, 181.  
 when, to be entered, 197.  
 may be for defendant for excess of set-off, 199.  
 may be for possession of personal property, 200.  
 book to be kept by Clerk, 201, 376, 378.  
 not to be lien in case of death, 202.

**JUDGMENT, Continued.**

transcript of, docket may be recorded in other county and shall be there a lien, 207.

how to be satisfied, 208.

execution upon, may issue at any time within five years, 209.

to be enforced by execution, 213.

when certified copy of, to be served, 213.

when and how execution to issue upon, after death of party, 215.

may be summary against delinquent bidder at Sheriff's sale, 225.

how and in what cases, may be revived, 237.

defendant may be arrested after, 239.

creditors may prosecute to, actions to recover debts of judgment debtor, 244.

may be to abate or enjoin nuisance, 249.

to be according to fact when interest of plaintiff terminates during action, 256.

in partition, on whom to be conclusive, 278.

in partition, who not to affect, 279.

in action against usurper, what to be, 312-314, 316.

against steamer, etc., 328.

when final to be appealed from, 336.

may be reviewed on appeal, 333, 347, 359, 366.

may be against one or more, 368.

by County Court on appeal how enforced, 367.

when to be denied by joint debtor, 372.

may be for surplus of original, 373.

by confession how and when entered, 374-376.

upon submission of controversy without action how and when entered, 377-379.

may be entered upon an award, 382, 385.

may be entered upon offer, 390.

to carry costs, 499, 511.

on writ of mandate, 477.

on indemnity bond to Sheriff, 645.

See **DISMISSAL; NONSUIT; JUSTICES' COURTS; DEFAULT; EXECUTION.**

to summons jury to try issue in *mandamus*, 474.

to punish summarily for contempt in certain cases, 481.

to indorse amount of bail on warrant for contempt, 483.

See **COURT.**

roll, what to constitute, 203.

to be entered in docket, 204.

to be a lien on real property for two years, 204.

docket, what to contain, 205.

docket to be open for inspection, 206.

**JUDGMENT CREDITOR**, if purchaser evicted to be liable, 237.

may require order to examine debtor, 238.

may require arrest of debtor, 238.

**JUDGMENT DEBTOR**, execution against, 210.

execution against, after death, 215.

may point out property to Sheriff, to sell under execution, 220, 223.

may redeem property sold, 230.

when he may redeem, 231.

what payments to be made to, 233.

may be required to appear and answer as to his property, 238.

may be arrested, when, 239.

may be punished for contempt, 245.

what portion of wages of, to be exempt from execution, 243.

what property of, to be exempt from execution, 219.

**JUDICIAL DAYS**, p. 570.

**JURISDICTION**, of Court, acquired by service of summons and complaint, 35.

also acquired by voluntary appearance, 35.

want of, in the Court ground of demurrer, 40.

objection to, never waived, 45.

**JURISDICTION, *Continued.***

in pleading a judgment, facts conferring jurisdiction need not be stated, 59.  
if controverted must be proved, 59.

See **JUSTICES' COURTS.**

**JURORS, how drawn to try causes, 156.**

number of, 159.

parties may consent to any number of, not less than three, 159.

substance of oath of, 160.

may be challenged by parties, 161.

on what grounds, may be challenged, 162.

may be discharged when sick, 164.

may make notes during the trial and use them during their deliberations, 167.

what is verdict of, 174.

affidavit of, to impeach verdict, 193.

may be witness, 400.

See **JUSTICES' COURTS.**

**JURY, to try question of fact not in issue by pleadings, 3.**

Sheriff may summon, in attachment where property claimed by third person, 131.

**JUSTICES' COURTS.**

*Act*, relating to, p. 526.

*Actions*, civil, to be brought in defendant's township, 535.

when may be brought elsewhere, 535.

venue of, in San Francisco, 535.

how commenced, 538.

*Adjournment*, when necessary by amendment of pleadings, 580.

when jury is demanded, 582.

for cause not exceeding ten days, 583.

for cause not exceeding four months, 584.

undertaking on, 585.

*Affidavits*, for publication of summons, 543.

on arrest of defendant, 544.

on attachment, 552.

in action to recover possession of personal property, 557.

for change of venue, 582.

on motion for adjournment, 583.

on application for new trial, 623.

*Allegations*, variance between proof and, when disregarded, 579.

*Amendments*, of defective pleading, 578.

when party entitled to costs on, 580.

*Answer*, when not incumbent on party to, 535.

in what cases township disregarded, 535.

to state ground of defense, 570.

when to be in writing or verified, 571.

when oral, 572.

must contain denial or set up counter claim, 574.

want of sufficient knowledge or information, 575.

to specifically deny genuineness of written instrument, 577.

*Appearance*, voluntary, of parties objection to, waives jurisdiction, 537.

*Appeal*, to County Court, when heard on statement; when tried anew, 366.

orders, etc., may be reversed; new trial how conducted, failure to prosecute, 367.

how taken; within what time; statement on notice, 624.

statement and amendments to be settled by Justice, 625.

when new trial to be had, 626.

duty of Justice on receiving notice of; payment of fees, 627.

undertaking on, 628.

stay of proceedings on, 629.

*Arrest*, of defendant, when and in what cases, 544.

undertaking on, 545.

undertaking of defendant, 550.

defendant may give bail, 549.

judgment on, to be rendered immediately, 594.

JUSTICES' COURTS, *Continued.*

- judgment on, when defendant subject to, must so state, 597.
- when contempt committed, 617.
- Attachment*, in what cases to issue, 551.
  - undertaking on, 553.
  - undertaking on release of, 554.
- Attorney*, who may act as; Constable not to act as, 534.
- Blank*, not to be left in any paper except subpoena, 611.
- Challenge*, to jurors, for cause, to be tried by Justice, 590.
  - cause of, 162.
- Claims*, to recover possession of personal property, 556.
  - undertaking on, 559.
  - defendant may require return of property on giving bond, 561.
  - of third persons to right of possession of, 565.
- Commission*, may be issued, 620.
- Complaint*, shall state cause of action, 570.
  - when to be in writing and verified, 571.
  - when oral, to be entered in docket, 572.
  - to state facts plain and direct, 573.
  - when on a note or written obligation, 577.
- Compromise*, offer of, and acceptance, 596.
- Concealment*, of defendant to avoid service of process, 543.
  - of personal property, 563.
- Confession of judgment*, may be entered, 536.
- Contempt*, punishment for, by Justice, 616.
- Corporations*, service of summons on, 542.
- Costs*, shall be added to amount of verdict, 598.
  - in case of dismissal judgment to be entered therefor, 598.
  - prevailing party entitled to, 631.
  - Justice may demand deposit for, 634.
- Counter claim*, may be set up in answer, 576.
- Debtors*, examination of judgment, 602.
- Default*, of plaintiff, dismissal of action, 586.
  - of defendant, judgment on proofs, 586.
  - of defendant when action on written instrument, judgment to be entered, 592.
- Defendant*, to be addressed by name, 540.
  - to be personally served, 542.
  - where taken upon arrest, 546.
  - may demand immediate trial, 549.
  - may be discharged by action of plaintiff, 549.
  - may be released on giving bail, 550.
- Demurrer*, to pleadings or part thereof, 578.
- Dismissal*, of action without prejudice, 591.
- Disobedience*, to a lawful writ, order of process, 616.
- Docket*, to be kept by Justice, what must contain, 604.
  - shall be primary evidence, 605.
  - alphabetical index to, 606.
- Evidence*, written instrument or copy may be used on trial, 576.
  - original written instrument may be ordered to be produced, 576.
- Exceptions*, of defendant to sufficiency of sureties, 560.
- Excess*, of amount found due may be remitted, 595.
- Execution*, may issue within five years, 600.
  - shall issue to Constable or Sheriff, 601.
  - how executed, 602.
- Forcible entry and detainer*, fine for, p. 577.
  - Justice has authority to inquire into and make restitution, p. 581.
  - complaint to be in writing, p. 582.
  - summons to be served not less than two nor more than ten days before return, p. 582.
  - special return of service, p. 582.
  - complaint may be heard by Justice unless jury demanded, p. 582.
  - jury may be demanded, p. 582.



**JUSTICES' COURTS, Continued.**

- service upon absent defendant, p. 582.
- adjournment not exceeding ten days may be had, p. 583.
- adjournment not exceeding three months on giving bond, p. 583.
- testimony of witness as in other cases, p. 583.
- what complainant need show, p. 583.
- what defendant may show, p. 583.
- question of title to land Justice has no jurisdiction, p. 584.
- when judgment of restitution ordered, p. 584.
- fine not exceeding one hundred dollars may be imposed, p. 584.
- costs to be taxed and execution therefor, p. 584.
- when jury cannot agree, p. 584.
- damages shall be assessed, p. 584.
- when persons hold over after termination of time of letting, p. 585.
- persons in possession one year after termination of lease, p. 587.
- jurors or witnesses failing to appear shall pay fine not exceeding twenty dollars, p. 587.
- either party may appeal within ten days upon giving bond, p. 587.
- appeal to stay proceedings and cause to be tried anew, p. 588.
- party in possession shall retain the same until appeal is determined, p. 589.
- appellate Court not to dismiss appeal for want of form, p. 589.
- amendments may be allowed, p. 589.
- forms to be used, pp. 589, 590.
- Garnishment*, sections applicable thereto, 555.
- Guardian*, Justice shall appoint, 539.
- consent of, to be in writing, 539.
- Infant*, how served with process, 542.
- Insane person*, how served with process, 542.
- Joint debtors*, judgment to be entered against, 594.
- Judgment*, transcript of, may be filed and docketed with the County Clerk, 599.
- time of receipt of such transcript to be noted, 599.
- Jurisdiction*, of, in cases of joint contract and liability of parties, 535.
- of, in cases of injury to person or property, 535.
- of, in cases of detention of or damages for personal property, 535.
- of, in cases of foreclosure of mortgage or lien, 535.
- upon personal property, 535.
- Jurors*, to be citizens of township or city and not bystanders, 587.
- may be challenged, peremptory or for cause, 590.
- Jury*, trial by, when to be demanded, 587.
- how empaneled; to consist of not less than three, 588.
- Justification*, of plaintiff's sureties, when excepted to, time for, 560.
- of defendant's sureties, when excepted to, time for, 562.
- of plaintiff's sureties when properly claimed by third party, 565.
- Lien*, judgment created by filing transcript with County Clerk, 599.
- Mail*, service made by, 543.
- Mines and mining*, pleadings shall be in writing, 571.
- must be verified, 571.
- verification may be by agent or attorney, 571.
- proof of customs, etc., shall be admitted, 621.
- customs, usages or regulations must be established and in force, 621.
- must apply to the particular claim, 621.
- customs, usages and regulations shall govern decision of action, 621.
- such customs, etc., must not be in conflict with Constitution and laws of this State, 621.
- a receiver may be appointed, 651.
- application to be made by party out of possession, 651.
- notice to adverse party, 651.
- parties may agree upon a person, 651.
- receiver shall take an oath, 651.
- Justice to put receiver appointed into possession, 651.
- shall have power to issue written order, 651.
- to whom directed, 651.
- receiver shall remain in possession until action determined, 651.

**JUSTICES' COURTS, *Continued.***

- Court may issue order for disposition of proceeds, 651.
- application may be made by either party, 651.
- notice to adverse party, 651.
- Court may punish as for contempt person disturbing receiver in possession, 651.
- application to be made by receiver, 651.
- must be upon his affidavit, 651.
- receiver shall keep account of proceeds, 652.
- receiver shall keep account of amount paid out, 652.
- shall retain proceeds, 652.
- shall pay over by order of Court, 652.
- receiver shall give security, 652.
- security may be demanded by either party, 652.
- receiver shall be allowed reasonable compensation, not to exceed ten per cent., 652.
- Minor.* See **INFANT.**
- New trial*, in what cases may be granted within ten days, 622.
- notice of motion for, 623.
- Nonresident*, how served with process, 543.
- may be served with process by publication, 543.
- Offer.* See **COMPROMISE.**
- Officer*, arrest of, in civil cases, 544.
- Parties.* See **APPEARANCE.**
- Pleadings.* See **ANSWER; COMPLAINT; DEMURRER.**
- Property*, personal, party claiming delivery of, 556.
- real, question of title to, cannot be tried, 581.
- Publication*, service of summons by, 543.
- Receiver.* See **MINES AND MINING.**
- Return*, of summons, when to be made, 541.
- of process in replevin to be made within five days, 565.
- Set-off.* See **COUNTER CLAIM.**
- Sheriff*, may serve process, 542-554.
- Stay of proceedings*, shall be granted, 629.
- Subpoena*, Justices may issue, in any action or proceedings, 619.
- Summons*, waiver of, by appearance, 537.
- issuance of, 538.
- to be addressed to defendant by name, 540.
- contents of, 540.
- Justice shall subscribe, 540.
- when returnable immediately, 541.
- when returnable in not more than two days, 541.
- when returnable in not less than ten days, 541.
- service of, 542.
- service of, against absent or concealed defendant, 543.
- to be filled up, 611.
- Supplementary proceedings*, examination of judgment debtor, 602.
- examination of creditors of judgment debtor, 602.
- examination of parties holding property of judgment debtor, 602.
- Sureties*, on order of arrest, 545.
- on writ of attachment, 553.
- on claim of personal property, 559.
- on release of personal property, 561.
- Surprise.* See **NEW TRIAL.**
- Tender.* See **COMPROMISE.**
- Third person*, claim of, to personal property, 565.
- Transfer*, when defendant under arrest, 546.
- when Justice is a witness, 582.
- when Justice is biased, 582.
- Undertaking*, on order of arrest, 545.
- on release from arrest, 550.
- to obtain writ of attachment, 553.
- to release writ of attachment, 554.

**JUSTICES' COURTS, Continued.**

- in writ of replevin, 559.
- on release of writ of replevin, 561.
- on indemnity to officer when property claimed by third person, 565.
- on obtaining adjournment of cause, 585.
- Variance*, between proof on trial and allegations in pleading, 579.
- Venue*. See **TRANSFER**.
- Witness*, when Justice is material, in action when defendant arrested, 546.

**L**

- LAW**, issue of law, how defined, 151.
  - trial by the Court, conclusions of law and fact to be separately stated, when, 180.
  - decision to be filed with the Clerk, 180.
  - for errors of, new trial to be granted, 193.
- LEASEHOLD**, subject to redemption, when, 229.
- LEVY**. See **EXECUTION**.
- LIABILITY**, joint and several, of defendants, how prosecuted, 32.
  - upon obligations and instruments in writing, 15.
  - of steamers, vessels and boats, 317.
  - confession of judgment to secure contingent liability, to state facts constituting, 375.
  - of officer arresting and detaining witness, 416.
- LIBEL**, how stated in complaint, 62.
  - what answer may contain, 63.
- LIEN**, of judgment, 202, 204, 207.
  - foreclosure of, 246.
  - in partition suits, 273.
  - holders of, to be made parties, 273.
  - to be notified to appear before referee, 274.
  - when on an undivided interest, 281.
  - holder may be ordered to exhaust other securities, 284.
  - when holder becomes purchaser, 298.
  - upon vessels, 317.
- LIMITATION**, of action on causes arising out of this State, 532.
- LIS PENDENS**, notice of, what to contain, 27, 207.
  - effect of, 27, 207, 267.
  - where filed, 27, 267.

**M**

- MANDAMUS**, writ of, how denominated, 466.
  - by whom issued, 467.
  - to whom issued, 467.
  - who may not issue it, 467.
  - its object and province, 467.
  - in what cases it shall issue, 468.
  - shall issue upon affidavit, 468.
  - party beneficially interested to make the application, 468.
  - writ shall be alternative or peremptory, 469.
  - alternative shall state allegation, 469.
  - shall command party to perform the act required, or show cause, 469.
  - peremptory writ, 469.
  - order to show cause omitted, 469.
  - return day shall be inserted, 469.
  - when application is made without notice, alternative writ shall issue, 470.
  - upon application after notice, peremptory shall first issue, 470.
  - time required to constitute due notice, 470.
  - writ not to be granted on a default, 470.
  - case to be heard even if adverse party be absent at the hearing, 470.
  - adverse party may show cause on return of alternative, 471.
  - answer under oath, 471.

**MANDAMUS, Continued.**

- question of fact may be tried by jury, 472.
  - order for jury discretionary with Court, 472.
  - argument to be postponed, 472.
  - verdict to be verified to Court, 472.
  - question to be distinctly stated in the order, 472.
  - county to be designated, 472.
  - order may direct jury to assess damages, 472.
  - applicant may introduce proof on trial, 473.
  - either party may move for a new trial, 474.
  - statement required, 474.
  - motion for new trial, 474.
  - before whom brought, 474.
  - when to be brought, 474.
  - upon new trial, jury to be summoned, 474.
  - within what time, 474.
  - parties may agree upon time, 474.
  - jury to try issue, 474.
  - when new trial shall not be had, 474.
  - Clerk to transmit certified copy of verdict, 475.
  - to whom it shall be transmitted, 475.
  - within what time, 475.
  - either party to bring on argument of application, 475.
  - notice to be given to adverse party, 475.
  - when no answer made, case heard on papers of applicant, 476.
  - answer not raising question of fact may be tried without jury, 476.
  - answer explained or avoided by reply, 476.
  - Court to grant time for replying, 476.
  - discretionary with the Court, 476.
  - answer and reply raising questions of law only to be heard by Court, 476.
  - statements not affecting the substantial rights of parties may be heard by the Court, 476.
  - Court may fix time for the argument, 476.
  - applicant shall recover damages sustained, 477.
  - jury may find such damages, 477.
  - Court or referee may determine said damages, 477.
  - reference may be ordered, 477.
  - costs shall be allowed, 477.
  - execution may issue, 477.
  - peremptory mandate shall be awarded, 477.
  - writ, how served, 478.
  - Court may direct mode of service, 478.
  - fine for disobedience to peremptory writ, 479.
  - party persisting in disobedience to the writ, may be imprisoned, 479.
  - Court may make orders for enforcement of writ, 479.
  - fine against any Judge or officer drawing salary from the State or county may be drawn from said salary, 479.
  - certified copy of order to be forwarded, 479.
  - to whom sent, 479.
  - amount to be retained, 479.
  - willful disobedience or misdemeanor in office, 479.
  - writ may issue in vacation, 653.
  - returnable in vacation, 653.
  - may be heard during vacation, 653.
- MARINER, person employed as, may attach, 329.**
- shall file an affidavit, 329.
  - shall specify amount and particular service rendered, 329.
  - undertaking to discharge attachment must cover amount claimed and other requirements, 329.
  - execution shall direct the application of proceeds of sale, 329.
  - shall pay amount of claims filed or determined, 329.
  - Clerk shall insert amount in writ, 329.
  - shall pay judgment, costs and Sheriff's fees, 329.

**MARINER, Continued.**

balance to be paid to owner, etc., who appeared, 329.  
 when no appearance, balance to be deposited in Court, 329.  
 claim not contested shall be deemed admitted, 330.  
 time allowed for contesting, 330.  
 if contested, Clerk shall so indorse upon affidavit, 330.  
 Clerk shall indorse thereon ground of contest, 330.  
 Clerk shall order matter to a single referee for determination, 330.  
 Clerk may hear proofs and determine himself, 330.  
 judgment of Clerk or referee may be reviewed, 330.  
 by whom reviewed, 330.  
 when to be reviewed, 330.  
 judgment of County Judge final, 330.  
 County Judge may use minutes of Clerk or referee, 330.  
 may take proof anew, 330.

**MARK, in signature, 647.**

when, is good, 647.  
 name to be written, 647.  
 shall be witnessed, 647.  
 witness shall write his own name, 647.

**MARRIED WOMEN, when husband shall be joined, 7.**

when married woman may sue alone, 7.  
 when she may sue and be sued alone, 7.  
 when she may defend for her own right, 8.  
 her husband not to be witness against her, 395.  
 wife not to be witness against her husband, 395.  
 neither to be examined as to any communication between each other during marriage, 395.  
 neither to be examined after marriage, 395.  
 either party may consent to such examination, 395.  
 consent not necessary in action by one against the other, 395.  
 testimony of husband and wife to establish marriage may be taken and perpetuated, 438.

**MASTER OF VESSELS, may appeal from order and judgment, 332.**

owner, agent or consignee may appeal, 332.

**MATTER, redundant, may be stricken out, 57.**

irrelevant, may be stricken out, 57.  
 by whom to be stricken out, 57.  
 how to be stricken out, 57.  
 person aggrieved may make motion, 57.

See **NEW MATTER.**

**MAYORS' COURTS, organization act, p. 567.**

what actions may be brought, how commenced, 636.  
 when returnable, 637.  
 defendant's plea may be oral or in writing, 638.  
 when trial shall be by Court or jury, 639.  
 appeal may be taken to County Court, 640.  
 proceedings, how conducted, 641.

**MEMORANDUM, judgment creditor shall make, of costs and disbursements, 500.**

shall be verified by party, 500.  
 attorney may verify the same, 500.  
 what verification shall state, 500.  
 to whom delivered, 500.  
 within what time, 510.

**METES AND BOUNDS, shall be described in complaint, 58.**

action, when necessary, 58.  
 survey and measurement may be ordered, 258.  
 for what purpose, may be allowed, 258.  
 who may grant the order, 258.  
 motion for order to survey, 258.  
 who may make motion, 258.  
 notice required, 258.  
 party may enter upon property under order, 258.

**METES AND BOUNDS, Continued.**

- order shall describe property, 259.
- copy of order shall be served on owner or occupant, 259.
- surveyors and assistants necessary may enter upon property, 259.
- may make survey and measurement, 259.
- party liable for unnecessary injury, 259.

**MINES AND MINING CLAIMS. See JUSTICES' COURTS.**

**MINISTER**, of United States shall take affidavit, 426.

**MINOR. See INFANT.**

**MISJOINDER**, of parties, to be demurred to, 40.

- of causes of action, to be demurred to, 40.

**MISTAKE**, in name of party may be corrected, 68.

- in other respects may be corrected, 68.
- terms may be imposed, 68.
- party may be relieved of judgment, order, etc., taken against him, 68.
- costs to be paid, 68.

**MODIFICATION**, of verdict, may be made, 172.

- when it may be done, 172.
- under whose advice it may be done, 172.
- jury may be sent out to bring new verdict, 172.
- of award, 387.
- by whom done, 387.
- motion requisite, 387.
- may be made if there be a miscalculation of figures, 387.
- mistake in description of person or property, 387.
- when award if made upon matters not submitted, 387.
- when it could have been amended if it had been a verdict, 387.

**N**

**NAME**, of parties, pleadings may be amended as to, 68.

- of defendant, when plaintiff is ignorant of, 69, 540.

**NEGLIGENCE**, relief from judgment taken through excusable neglect, 68.

**NEW MATTER**, answer may contain, constituting defense, 46.

- plaintiff may demur to sufficiency of, 50.
- shall be taken to be controverted on trial, 65.
- issue will arise upon, 153.
- if adverse party testify to, not responsive, 421.

**NEW TRIAL**, definition of, 192.

- immaterial exceptions disregarded on motion for, 188.
- report of Judge or referee deemed excepted to on motion for, 191.
- when motion for, will be granted, 193.
- irregularity in the proceedings ground for, 193.
- abuse of discretion ground for, 193.
- misconduct of jury ground for, 193.
- accident or surprise ground for, 193.
- newly discovered evidence ground for, 193.
- excessive damages ground for, 193.
- insufficiency of the evidence to justify the verdict ground for, 193.
- error in law ground for, 193.
- application for, how made, 194.
- when notice of motion for, 195.
- time for filing affidavit or statement, 195.
- settlement of statement, 195.
- adverse party may use counter affidavits, 195.
- application for, to be made without delay, 196.
- appeal may be taken from order granting or refusing, 336, 347.
- County Court may order, 367.
- on application for *mandamus*, 474.

**NONRESIDENT**, where to sue or to be sued, 20.

- affidavit for publication of summons against, 30.
- service of summons on, 31.
- Court may appoint attorney to appear for, 31.

**NONRESIDENT, Continued.**

- verification of pleadings, when a party is, 55.
- property of, may be attached, 120.
- proof of claim after default of, 150.
- judgment by default against, may be opened, 68.
- service of summons on, in partition suits, 269.
- investment of funds of, on sale in partition suits, 300, 303.
- may be required to give security for the costs, 512.
- sureties on costs-bond shall justify, 513.
- if security be not given, action may be dismissed, 514.
- service of papers on, after appearance, 524.

**NONSUIT, when judgment of nonsuit may be entered, 148.****NOTES. See PROMISSORY NOTES.**

- NOTICE**, plaintiff may file *lis pendens* in actions concerning real estate, 27, 267.
  - of motion for new trial to be given, when, 195.
  - within what time statement on motion for a new trial to be filed after, 195.
  - to be given of settlement of statement, 195.
  - of motion, what time necessary, 517.
  - service of, on party resident, 520.
  - service of, by mail, 521, 522.
  - defendant entitled to notice of proceedings after appearance, 523.
  - service of, when party is nonresident, 524.
  - service of, shall be upon attorney, 524.

**NUISANCE, what is a, 249.**

- action for, who may bring, 249.
- judgment in action for, 249.

**O****OATHS, who may administer, 443.**

- how a person sworn, 443.
- affirmation, how given, 445.
- arbitrators may administer, 383.
- person may make affirmation instead of, 445.
- false affirmation is perjury, 445.

See **AFFIDAVITS; SURETIES.****OBJECTIONS. See ANSWER; DEMURRER; EXCEPTIONS; JUSTICES' COURTS.**

- OFFER**, of defendant to allow judgment to be taken against him, 390.
  - how accepted by plaintiff, 390.
  - deem withdrawn if not accepted, 390.
  - not to be given in evidence, 390.

See **JUSTICES' COURTS.****OFFICE, action may be brought for usurping, 310.**

- Attorney General to bring action for usurping, 310.
- defendant may be arrested for receiving fees belonging to, 311.
- how usurper of, may be discharged from arrest, 311.
- damages for usurpation of, 314.
- usurper of, may be fined and excluded from, 315.
- action may be had against several claimants of, 315.

**OFFICER, PUBLIC, action against, where tried, 19.**

- action against person aiding, where tried, 19.
- action touching any official duty of, where tried, 19.
- action touching any act done in virtue of office, where tried, 19.
- how judgment or determination of, pleaded, 59.
- may be arrested for embezzlement, 73.
- may be arrested for fraudulently applying money, 73.
- may be arrested for converting money to his own use, 73.
- not to be examined as a witness in certain cases, 398.
- may order subpoena to be served by a Sheriff on concealed witness, 405.
- issuing subpoena may issue warrant for arrest of witness, 411.
- when not liable to witness arrested, 416.
- authorized to take testimony or decide upon evidence may administer oaths, 443.

**OFFICER, PUBLIC, Continued.**

- disobeying writ of *mandamus* may be fined, 479.
- amount of fine against, may be retained from salary, 479.
- for willful disobedience, guilty of misdemeanor, 479.

See **JUSTICES' COURTS.**

**OPINION**, of Judge to be furnished by appellant to appellate Court, 346.

- of appellate Court to be given in writing, 657.

**ORDER OF ARREST**, from whom obtained, 75.

- when to be made, 75.
- affidavit to obtain, to be filed, 75.
- undertaking required before making, 76.
- what to accompany, 77.
- how executed, 78, 79.
- when and how returned, 86.
- may be vacated, 97.

See **ARREST.**

**ORDER OF COURT**, to bring in other parties, when, 17.

- for trial of fact not in issue by the pleadings, 3.
- to serve summons by publication, 30.
- shall direct publication for a certain period, 31.
- to appoint attorney for absent defendant, 31.
- restraining defendant, pending motion for injunction, 114.
- to show cause why an injunction should not issue, 116.
- to survey property in dispute, 259.
- appeal from, 333, 344, 347.
- made out of Court may be vacated, 334.
- appeal from, 335.
- of arbitration, by consent, 382.
- to have prisoner examined as witness, 413.
- of arrest. See **ARREST.**
- to take depositions, 429.
- to issue commission to take testimony out of the State, 433.
- to perpetuate testimony, 438.
- shall be served or published according to the particular case, 438.
- to show cause why warrant for contempt should not issue, 482.

**ORDINANCE**, how actions for violation of, begun, 636.

- complaint may refer to, by its title, 636.
- actions for violation of, when tried by Court, 639.
- actions for violation of, when tried by jury, 639.

**ORIGINAL**, writing, loss of, to be shown before other evidence allowed, 447.

- in what cases other evidence than the, allowed, 447.

See **WRITINGS.**

**P****PAPERS.** See **WRITINGS.****PARTIES**, names of, in civil action, 2.

- in interest, to prosecute actions, 4.
- what, to be joined as plaintiffs, 14.
- what, to be joined as defendants, 14.
- severally liable may or may not be joined at plaintiff's option, 15.
- Court may determine any controversy between, 17.
- may be ordered brought in, 17.
- to an action to be stated in summons, 24.
- to an action to be stated in complaint, 39.
- another action pending between same, ground of demurrer, 40.
- defect of, ground of demurrer, 40.
- misjoinder of, 40.
- pleadings may be subscribed by, 51.
- pleadings may be verified by, 55.
- need not set forth items of an account in a pleading, 56.
- may amend pleadings, of course, 67.
- name of, may be added or stricken out of pleadings by the Court, 68.



**PARTIES, Continued.**

- errors in pleadings not affecting substantial rights of, to be disregarded, 71.
- may have nonsuit entered, 148.
- may bring issue to trial, 157.
- may consent to a jury less than twelve, not less than three, 159.
- may waive jury trial, 179.
- may agree to reference of cause, 182.
- not consenting, when reference may be ordered, 183.
- to agree upon referees, 184.
- may object to referees, 185.
- to actions to determine claims to real property, 254.
- may enter upon land to survey the same, 258.
- to action for partition of real property, 264.
- in partition, interest of all to be set forth in complaint, 265.
- if unknown, that fact to be stated in complaint, 265.
- to pay expenses of partition, 280.
- may consent to one referee in partition, 309.
- adverse, to be served with notice of appeal, 337.
- to sign agreed statement on appeal, 341.
- either of the, may bring appeal to a hearing, 351.
- refusing to be sworn, may have pleadings stricken out, 309.
- may agree upon case without action, 377.
- when, may be witnesses, 422, 399.
- may be witnesses in their own behalf, 422, 423.
- when to be examined, 418.
- refusing to testify may be punished for contempt, 420.
- may have deposition taken, 429.
- may attend examination of witness by deposition, 430.

See JUSTICES' COURTS.

**PARTITION, of real property, 264-309.**

- when an action for, may be brought, 264.
- in what county action for, may be tried, 18.
- complaint in, what to state, 265.
- lis pendens* to be filed in an action for, 267.
- how summons in, to be directed, 268.
- how summons served in, 269.
- party is out of the State, 269.
- what answers in, to contain, 270.
- what rights may be determined in, 271.
- how rights of unknown parties in, determined, 271.
- lienholders to be made parties to a, 273.
- lienholders to be brought into, by amendment or supplemental complaint, 273.
- lienholders in, to be notified to make proofs, 274.
- Court may order property sold in, where no division can be made, 275.
- Court to order, when, 275.
- how to be made, 276.
- referees in, to make report, 277.
- Court may confirm or set aside report of referees in, 278.
- effect of, 278.
- judgment in, not to affect tenants for years less than ten, 279.
- referees' expenses in, how paid, 280.
- how lien on undivided share affected by, 281.
- how life estate in undivided share affected by, 282.
- when property ordered sold in, how proceeds applied, 283, 285, 286.

See PROPERTY, REAL.

**PARTNERS. See COPARTNERS.****PENALTY, STATUTORY, where enforced, and in what county tried, 19.****PENDENCY OF ACTION, notice of, where filed, what to contain, and effect of, 27, 207, 267.****PEOPLE, who to verify pleadings in actions by, 55.**

- injunction granted against corporation in action by, 117.

- action for usurpation of office or franchise to be brought in the name of, 310.

- PERFORMANCE**, of conditions precedent, how pleaded, 60.
- PERISHABLE**, property attached, to be sold, 130.  
property, levied on under execution to be sold on notice, 221.
- PERPETUATE TESTIMONY**, proceedings to, 437-442.  
application to, to be by petition duly verified, 438.  
what partition to show, 438.  
examination to be before Judge, 438, 439.  
how examination conducted, 440.  
depositions taken under proceedings to, to be used as evidence on trial, 442.
- PERSONAL PROPERTY**. See **PROPERTY**; **REPLEVIN**.
- PERSONS**, when expressly authorized by statute, may sue for benefit of other parties, 6.  
of unsound mind, how summoned, 29.  
when, may be required to attend as witnesses, 402.  
present in Court may be made witnesses, 406.  
See **PARTIES**.
- PETITION**, to perpetuate testimony, what to contain, 437, 438.  
intervention to be by, 661.  
copy of, to be served on party against whom demand is made in an intervention, 661.
- PHYSICIAN**, not to be witness in certain cases without consent of patient, 398.
- PLACE**, of trial of civil actions, 18-21.  
actions to be tried where subject matter situated, 18.  
actions to be tried where cause of action arose, 19.  
actions to be tried where parties reside, 20.  
of trial may be changed by Court on motion, 21, 367.  
appeal may be granted from an order refusing to change place of trial, 336, 347.  
See **JUSTICES' COURTS**.
- PLAINTIFF**, is the party complaining, 2.  
all having interest may be joined, 12.  
who may be made plaintiffs, 12.  
when made defendant, 13.  
who must be joined as plaintiffs, 14.  
who must be joined as defendants, 14.  
when one or more, may sue for the benefit of all, 14.  
when they may in one action sue persons severally liable, 15.  
may apply for judgment or relief, when, 26.  
pleadings of, 38.  
demur to defect of parties, 40.  
demur to answers or defenses, 50.  
must deny signature of instrument set up in answer, 54.  
how and when, 54.  
must swear to complaint, 55.  
who is excepted, 55.  
may unite several causes of action, 64.  
may have defendant arrested, 73.  
affidavit for arrest of defendant, 75.  
must give undertaking, 76.  
may except to sureties on bond of release of defendant, 86.  
must be served with notice of justification of sureties, 87.  
may claim delivery of personal property, 99.  
must make affidavit for delivery, 100.  
may request Sheriff in writing to take possession of property, 101.  
must give undertaking, 102.  
property to be redelivered, on failure of defendant's sureties to justify, 105.  
may claim replevied property, 109.  
when he may obtain injunction, 112.  
to give bond on injunction, 115.  
who need not give bond, 115.  
may oppose motion to dissolve injunction, 118.  
to make affidavit for attachment, 121.  
to give undertaking on attachment, 122.

**PLAINTIFF, Continued.**

- to notify Sheriff as to credits of defendant subject to attachment, 126.
- judgment for, in attachment, 132.
- may sue on bond to release attached property, 134.
- may require sureties on release bond to justify, 137.
- may oppose motion to discharge the attachment, 139.
- when no answer is filed, what relief he shall obtain, 147.
- may dismiss action, 148.
- to demand judgment after service of summons by publication, 150.
- may bring issue to trial, 157.
- may take verdict, 157.
- may challenge jurors, 161.
- shall have four peremptory challenges, 161.
- may waive jury trial, 179.
- may object to referee, 185.
- may move for a new trial, 193.
- may bring cause before the Court for argument, 198.
- when he shall not recover costs, 255.
- when his title terminates pending suit, 256.
- what, must allege in partition suit, 265.
- to file *lis pendens*, 27, 267.
- rights of absent, may be tried, 271.
- to make lienholders parties in partition suit, 273.
- to notify lienholders, 274.
- may have vessel attached, 321.
- to make affidavit in proceedings against joint debtors, 370.
- of offer to compromise, 390.
- when to recover costs, 495.
- costs allowed to, in only one action where several actions brought on one instrument, 496.
- not to have costs when he recovers less than two hundred dollars, 498.
- to pay costs after tender, 506.
- to give security for costs in certain cases, 512.
- how papers served on, 520.
- nonresident, service may be on Clerk, 524.

See JUSTICES' COURTS.

**PLEADING, question of fact not in issue in, how tried, 3.**

- time in which defendant may file, 25.
- what are, 36.
- forms and sufficiency of, 37.
- what, allowed, 38.
- to be filed, 38.
- on whom served, 38.
- by whom subscribed, 51.
- by whom verified and form of verification, 55.
- items of account need not be set forth in, 56.
- when, need not be verified, 52.
- irrelevant or redundant matter to be stricken from, 57.
- how judgment recited in, 58.
- how conditions precedent recited in, 60.
- how private statutes recited in, 61.
- in actions for libel or slander, 62, 63.
- what causes of actions may be united in, 64.
- what are material allegations in, 66.
- when, may be amended, 67-69.
- how construed, 70.
- errors in, not affecting substantial rights shall be disregarded, 71.
- of parties refusing to testify may be stricken out, 420.
- of intervenor, 661.

See COMPLAINT; DEMURRER; ANSWER; JUSTICES' COURTS.

**PLURAL NUMBER** included in singular, 647.

**POINTS**, on appeal, to be furnished Justices or filed with Clerk, 357.

**POSTPONEMENT.** See CONTINUANCE.

- PRESENT TENSE** to include the future, 647.
- PRIEST**, when, shall not be a witness, 397.
- PRINTING**, what, to include, 647.
- PRISONER**, how, may be produced for examination as a witness, 412.
- PRIVATE**, rights, how enforced and protected, 1.  
wrongs, how redressed or prevented, 1.
- PROBATE COURT**, to be one in each county, p. 561.  
execution to issue in certain cases on permission of, 215.
- PROCEEDINGS**, irregularity of, ground for a new trial, 193.  
supplementary, to execution, 235-245.  
See **EXECUTION**.
- PROMISSORY NOTES**, not subject to set-off if assigned before due, 5.  
action by assignee of, 5.  
persons severally liable on, may be joined or not at the option of plaintiff, 15.
- PROOF**, what is, of service of summons, and how made, 28, 33.  
affidavit, admission and certificate are, 33.  
what certificate and affidavit shall state, 34.
- PROPERTY**, personal, several causes of action to recover, may be united, 64.  
several causes of action for damages for withholding, may be united, 64.  
defendant may be arrested for concealing, in an action to recover, 73.  
plaintiff may claim delivery of, 99.  
plaintiff claiming delivery of, to make affidavit, 100.  
other proceedings in action for delivery of, 100-111.  
what, may be attached, 124.  
how, attached, 125.  
claim of, by third persons, 109, 131, 218.  
inventory of, in attachment, 129.  
perishable, how sold, 130.  
how execution issued for levying on, 210.  
how execution levied on, 217.  
what, is exempt from execution, 219.  
judgment may be for possession of, 200.  
sale of, under execution, 221.  
how sold, 223.  
perishable, to be sold, 130, 221, 654.  
injuries to, where tried, 535.  
See **REFLEVIN; JUSTICES' COURTS**.
- married women may bring action for separate, alone, 7.  
real, actions for recovery of, where tried, 18.  
notice of *lis pendens* to be filed in actions affecting title to, 27, 267.  
how, described in actions to recover, 58.  
several actions to recover specific, may be united, 64.  
what other actions affecting, may be united, 64.  
how attached, 125.  
notice of sale of, on execution, 221.  
how sold, 223.  
certificate of sale of, what to contain, 229.  
how and by whom redeemed, 231.  
what is a nuisance to, 249.  
waste on, ground of action, 250.  
trespass on, ground of action, 251.  
damages for forcible entry upon title to, not subject to arbitration, 380.  
*actions on conflicting claims to*, 254-263.  
by whom brought and against whom, 254.  
when plaintiff shall not recover costs in, 255.  
how verdict and judgment shall be when plaintiff's right to recover, has  
terminated during the pendency of the action, 256.  
when value of improvements on, may be offset against damages, 257.  
Court may order survey, 258.  
plaintiff liable for injury to, by surveyors, 259.  
mortgage of, not a conveyance, 260.  
mortgage of, must be foreclosed, 246-248.  
Court may restrain injury to, during foreclosure, 261.

**PROPERTY, Continued.**

damages may be recovered for injury to, 262.  
 alienation not to prejudice action to recover, 263.  
*action for partition of*, 264-309.  
 by whom and against whom brought, 264.  
 what complaint to contain in, 265.  
 who not to be made parties in, 266.  
 plaintiff to file notice of *lis pendens* in, 267.  
 to whom summons directed in, 268.  
 how summons served on nonresidents in, 269.  
 what answers in, to contain, 270.  
 rights of several parties may be tried and determined in, 271.  
 Court may order lienholders brought into, 273.  
 trial of lienholder's rights, 274.  
 sale may be ordered in, when partition cannot be made, 275.  
 how referees to make partition of, 276.  
 referees to make report on partition of, 277.  
 Court may set aside or confirm report of referees on partition, 278.  
 judgment on partition of, 278.  
 whom judgment shall affect, 278, 279.  
 expenses of partition, how paid, 280.  
 how lien on an undivided interest affected by partition, 281.  
 how an estate for life or years in, affected by partition, 282.  
 how proceeds in, applied after sale of, 283.  
 when securities to be preferred, 284.  
 distribution of proceeds of sale of, in partition, 285, 286.  
 all sales of, in partition to be at public auction, 287.  
 notice of sales of, to be given, 287.  
 credit to be allowed in certain cases, 288.  
 referee may take mortgage on, for property sold on credit, 289.  
 tenant for life or years to receive a sum of money as a satisfaction, 290.  
 Court may order sum paid to tenant for life or years, 291.  
 Court to protect interest of unknown tenant, 292.  
 Court to protect vested or future contingent interest, 293.  
 terms of sale to be made known at the time of sale of, 294.  
 referees not to be interested in purchase of, 295.  
 purchase by referee to be void, 295.  
 guardian to purchase, if at all, for infant's benefit, 295.  
 referee to report as to sale of, 296.  
 referees to execute conveyances, 297.  
 party entitled to share in partition may purchase at sale, 298.  
 conveyances to be recorded, 299.  
 proceeds belonging to unknown owners to be invested, 300.  
 in whose name securities to be taken, 301, 302.  
 Clerk and successors to receive interest and principal and reinvest, 303.  
 Court may order compensation between parties in certain cases, 304.  
 guardian to receive proceeds when share of infant sold, 305.  
 also when share of insane person sold, 305.  
 guardian may consent to a partition without action, 307.  
 how costs of partition to be paid, 308.  
 Court on consent of parties may appoint one referee instead of three in partition, 309.  
 injuries to, where tried, 535.

**See JUSTICES' COURTS.**

**PUBLICATION**, service of summons may be made by, in certain cases, 30, 269.  
 to be made in newspaper most likely to give notice to defendant, 31.  
 proof of service of summons by, how made, 33.  
 notice of examination to perpetuate testimony to be given by, in certain cases, 438. **See JUSTICES' COURTS.**  
**PUBLIC OFFICER**, action against, where brought, 19.  
 action against, where tried, 19.  
**PURCHASER**, delinquent, under execution, 224, 225.  
 personal property to be delivered to, 227.

**PURCHASER, Continued.**

- payment to be made to, in certain cases, 233.
- to receive rents of property sold under execution, 236.
- if evicted from property purchased to revive judgment, 237.
- may recover damages from tenant, 262.
- who not to be, 295.

**Q**

- QUESTIONS**, of fact, not in issue by pleadings, how tried, 3.
- on examination of witnesses, 434.

**QUO WARRANTO**, writ of, 310-316.See **USURPATION**.**R****REAL PROPERTY**, action for recovery of, where tried, 18.

- action for partition of, where tried, 18.
- action for injuries to, where tried, 18.
- action for foreclosure of mortgage on, where tried, 18.
- action affecting title to, what is notice of, 27.
- how to be attached when standing in defendant's name, 125.
- how to be attached when not in defendant's name, 125.

**REAL PARTY**, in interest to prosecute action, 4.**REBUTTAL**, of testimony of party, 419, 421.**RECEIPT**, of Sheriff will discharge garnishee, 130.**RECEIVER**, when and how, may be appointed, 143.

in what cases, may be appointed, 143.

See **JUSTICES' COURTS**.**RECORD**, of the judgment to be lien on property of judgment debtor, 207.

of pendency of action to be notice, 27, 267.

**RECORDS**, miscellaneous provisions as to, 446-454.

- to be evidence, 447.
- how proved, 449.
- evidence of judicial, 449-452, 655.
- of foreign country, how proved, 451.

**RECORDERS' COURTS**, act organizing, p. 565.

- judgments in, how reviewed, 366.
- how civil actions commenced in, 636.
- proceedings in, 636-642.

**REDEMPTION**, when property subject to, fact to be stated in certificate of sale, 229.

- how may be effected, 230, 231.
- from redemptioner, 232.
- payment on, 233.
- what papers necessary to effect a, 234.

**REDEMPTIONERS**, who shall be, 230.

entitled to rents, 236.

**REDUNDANCE**, may be stricken from pleadings, 57.**REFEREE**, to examine third person in whose hands property attached, 128.

- may assess damages on default by order of Court, 150.
- may try issues of law or fact, 154, 155, 181, 182.
- may be appointed to examine long account, 183.
- to be residents of the county, 184.
- what objections may be taken to appointment of, 185, 186.
- report of, when to be filed, 187.
- report of, may be excepted to and reviewed, 187.
- report of, to have effect of special verdict in certain cases, 187.
- when report of, deemed excepted to, 191.
- judgment debtor to appear before, when and for what purpose, 238, 239.
- in partition of real property, 273-309.
- to take proofs as to outstanding heirs, 274.
- may be appointed to sell property, 276.

**REFEREE, Continued.**

- may be appointed to divide property, 276.
- to report to the Court, 274, 277.
- may take securities, 289.
- not to purchase property sold under partition, 295.
- sales by, to be at public auction, 287.
- party entitled to share in partition may purchase and give receipt to, 298.
- may pay proceeds of sale to guardian, 305.
- one, may be appointed by consent of parties, 309.
- to find amount of mariner's claim, 330.
- fees of, per day, 504.
- when there are three, all must meet, but two may act, 529.

**REFERENCE**, may be ordered to take account after judgment, 181.  
 when and how, ordered, 182, 183.  
 how many compose a, 184.

**REGISTER**, to be kept by Clerk, 528.

**RELIEF**, summons to recite demand for, 24.  
 to be demanded in complaint, 39.

**REHEARING**, of argument in Supreme Court, Rule 22, p. 614.

**REMITTITUR**, to be sent by Clerk of Supreme Court to Court where case tried, 358.

**RENTS**, action to recover, and profits of real property may be united with action to recover property, 54.

- to be paid to purchaser under execution, 236.

**REPEAL**, of statutes and sections, 648, 666.

**REPLEVIN**, actions in, 99-110.

- plaintiff may claim delivery of personal property, 99.
- plaintiff to make affidavit, 100.
- plaintiff to give undertaking, 102.
- Sheriff to approve undertaking, 102.
- how papers in, served, 102.
- defendant may except to plaintiff's sureties on replevin bond, 103.
- sureties to justify, 103.
- how sureties to justify, 105.
- attorney to require Sheriff to take property in, 101.
- Sheriff to take property in, 101, 107, 108.
- if property be concealed, how Sheriff to take in, 107.
- claim of property by third persons, 109.
- Sheriff to file proceedings, 110.
- Sheriff may demand indemnity bond, 109.
- judgment in, 200.
- qualification of sureties in, 106.
- Sheriff to keep property in, 108.

**REPORT**, of referees, where cause tried by them, 187.

- of referees in partition suit, 274, 277.
- of referee may be excepted to, 187.

**RESPONDENT**, is adverse party to appellant, 335.

- to file amendments to statement on appeal, 338.
- failing to file amendments to be deemed an agreement to the statement, 339.
- to except to sureties upon appeal bond after notice, 355.

**RESTITUTION**, writ of, in forcible entries, etc., p. 592.

**RETURN**, of summons, how made, 28.

- order of arrest to be returned, 77.
- how order of arrest returned, 86.
- of replevin papers, 110.
- of inventory of property attached to be made with writ, 129.
- of writ of attachment, how made, 141.
- of writ of *certiorari*, 463.
- of writ of mandate, 471.
- of execution, when made, 212.

See JUSTICES' COURTS.

**REVIEW**, writ of, and *certiorari* the same, 455.

- writ of, how and when granted, 456.

**REVIEW, Continued.**

- application for writ of, how made, 457.
- to whom writ of, directed, 458.
- writ of, what to command, 459.
- where stay of proceedings not asked, what writ to contain, 460.
- how served, 461.
- how far to extend under writ, 462.
- how return of writ of, may be amended, 463.
- other proceedings under writ of, 464, 465.

See CERTIORARI.

**REVOCATION, of submission to arbitration, when and how made, 382.**

- what damages to be recovered where arbitration revoked, 389.

**RIGHTS, one action for the enforcement or protection of private, 1.**

- Court may disregard errors and defects that do not affect substantial, 71.

**RULES, of Supreme Court, p. 611.****S****SALARY, of officer may be retained by Comptroller to pay a fine in certain cases, 479.**

See WAGES.

**SALE, of perishable property attached, 130.**

- of property attached to satisfy judgment, 132.
- on execution to be upon notice, 221.
- made without notice makes Sheriff liable, 222.
- on execution, how made, 223.
- certificate of, to be given, 227.
- nature of certificate of, 228.
- of real property in certain cases subject to redemption, 229.
- on foreclosure to be ordered, 246.
- on foreclosure to cease when judgment satisfied, 248.
- of property under partition, 271.
- how proceeds of, to be applied, 283, 285, 286.
- by referee to be made at auction, 287.
- may be on credit, 288.
- terms of, should be made known at time of, 294.
- referee not to be interested in, 295.
- to be reported to Court, 296.
- to be confirmed by the Court, 297.
- of vessels under execution, 328.
- notice of, how given, 331.
- of property attached may be made by order of Court where the interest of the parties will be subserved, 654.

**SAN FRANCISCO, Justices of the Peace in the townships of, may issue process to any part of city and county of, 535.****SATISFACTION, of judgment, when entered, 208.**

- to be executed by judgment creditor, 208.
- of judgment to be given by attorney any time within one year, 208.
- may be entered by order of Court, 208.

**SEAL, to be attached to summons, 23.**

- to be attached to writ of execution, 210.
- impression of, how made, 454, p. 323.

**SEAMEN, how, may assert claim for wages, 329, 330.****SEARCHER OF RECORDS, affidavit of, 273.****SECURITY may bring suit, 527.****SEPARATE PROPERTY, of married women, action concerning parties to, 7.****SESSIONS, Courts of, organic act, p. 541.**

- terms of, pp. 545, 551, 555; 560, 567.

**SET-OFF, assignment of action or demand not to prejudice, 548.**

- promissory note and bill of exchange not subject to, where assigned before due, 5.

**definition of, 47.**

- verdict on, when pleaded, 176.



**SET-OFF, *Continued.***

judgment to be given for excess of, over plaintiff's demand, 199.

See JUSTICES' COURTS.

**SERVICE, of summons, how effected, 28.**

of notices and papers, how effected, 520.

by mail of papers, etc., how effected, 521, 522.

when to be made on attorney, 523, 524.

**SHAM answers and defenses may be stricken out, 50.****SHARES, of stock may be attached, 124, 125.**

how attached, 125.

to be attached on execution, 217.

**SHERIFF, where, and for what cause, may be sued, 19.**

shall serve summons, 28, 542.

deputy, may serve process, 28.

required to arrest defendant, 77.

how order of arrest executed by, 79.

defendant arrested may surrender himself to, 82.

bail may surrender defendant to, 83.

to file order of arrest in Court, 86.

liable if defendant escape, 95, 96.

to approve undertaking in replevin, 102.

to serve affidavit, notice and copy of undertaking on defendant in replevin, 102.

to take property in replevin, 101, 107, 108.

to be responsible for property in replevin till sureties justify, 105.

may break inclosure to take property, 107.

to keep property till fees are paid, 108.

to file replevin papers in Court, 110.

to receive indemnity bond in replevin, 109.

attachments may issue to Sheriffs of different counties, 123.

how to execute attachment, 125.

to serve papers on debtors of defendants, 126.

to garnishee, 126.

may sell perishable property, 130.

to execute attachment without delay, 125.

to take inventory of property, 129.

to collect debts and credits, 130.

how to sell property attached, 130.

jury of, in attachment, 131.

how to satisfy judgment in attachment, 132.

to retain his fees out of the proceeds of sales, 133.

to redeliver attached property to defendant when judgment paid, 133.

when to deliver property attached to defendant, 135, 136.

shall return writ of attachment, 137.

to summon jury, 159.

to keep jury together, 166.

to levy on execution, 210.

to return execution, 212.

jury of, to try claims to property in execution, 218.

how to execute writ of execution, 220.

shall give notice of sale under execution, 221.

penalty against, for not doing it, 222.

not to be a purchaser at execution sale, 223.

to follow directions of judgment debtor as to sale, 223.

shall give receipt for debts collected belonging to judgment debtor, 240.

to attach steamers, etc., 323.

to sell vessels, etc., under execution, 338.

to serve subpoena, 405.

to serve warrant for contempt, 484.

to receive bail, 485.

to return writ and undertaking, 486.

how to keep prisoner confined, 492.

judgment on indemnity bond to, 645.

**SHERIFF, Continued.**

to sell property attached on order of Court, 654.

See JUSTICES' COURTS.

**SIGNATURE, to include mark, 647.****SINGULAR NUMBER deemed to include the plural, 647.****SLANDER, actions for, or libel, 62, 63.**

what complaint to contain, 62.

defendant may allege the truth of defamatory matter in his answer, 63.

defendant may give in evidence mitigating circumstances in, 63.

**SPANISH LANGUAGE, in what counties summons and other process may be in, 646.**

pleadings in certain counties may be in, by consent, 646.

**STATE, where action tried when defendants are nonresidents of the, 20.**

service of summons to be made by publication on nonresidents of, 30, 544.

how pleadings verified when, a party, 55.

defendant departing from, with intention to defraud creditors, may be arrested, 73.

attachments may be issued on contracts made or payable in, 120, 551.

how affidavits taken in, 424.

how affidavits taken in another, 425.

how affidavits taken in a foreign, 426.

how deposition of witness taken in, 428.

cause of action arising in another, 429.

how action may be maintained on, 532.

**STATEMENT, on motion for a new trial, 194.**

on appeal, what to contain, and on whom served, and when to be made, 338.

what shall be deemed a waiver of, and what a settlement of, 339.

when settled or agreed upon to be filed with Clerk, 341.

to be annexed to the judgment roll or order appealed from, 342.

to be furnished by appellant to appellate Court, 346.

on appeal to County Court on questions of law, 366.

in case of contempt, 481.

of case in Justices' Courts, 538.

on confession of judgment to be sworn to, 376.

**STATUTES, private, how pleaded, 61.**

evidence of, of other States, 453.

of limitation, when cannot be pleaded, 371.

**STAY OF PROCEEDINGS, may be granted after judgment, 197.**

may be granted on appeal, 349.

undertaking necessary to, 309, 350, 351, 352, 353, 356.

on writ of review, 459.

See JUSTICES' COURTS.

**STEAMERS, actions against, and other vessels, 317-332.**

liable for service on board, 317.

liable for supplies furnished, 317.

liable for materials for their construction or repair, 317.

liable for wharfage and anchorage, 317.

liable for non-performance or mal-performance of contract, 317.

liable for injuries to persons or property, 317.

causes of action against, to be liens upon, 317.

actions may be brought directly against, 318.

complaint to designate, 319.

on whom summons, etc., served, 320.

may be attached, 321.

undertaking on attachment against, 322.

Sheriff to attach, 323.

undertaking to release attachment against, 324.

in actions against, who may answer, 325.

proceedings against, how conducted, 326.

when attachment against, may be discharged, 327.

may be sold under execution, 328.

claim against, how asserted, 329.

claim against, how contested, 330.

**STEAMERS, Continued.**

Sheriff to give notice of sale of, 331.  
 appeal from judgment against, 332.

**STOCK**, how attached, 125.

**SUBMISSION**, of controversy, without action, 377.  
 to arbitration, 380.

See **CONTROVERSY ; ARBITRATION.**

**SUBPOENA**, may require the attendance of party with books, documents, etc., 402.  
 what the object and purpose of, 403.  
 how to be served, 404.  
 how to be served when witness is concealed, 405.  
 witness to obey, 407.  
 disobedience to, punished as a contempt, 409.  
 obeying, exonerates from arrest, 415.

See **JUSTICES' COURTS.**

**SUBSCRIPTION**, of pleadings, to be by party or his attorney, 51.

**SUBSTITUTION**, Court may allow, in certain cases, 16.

of real party defendant allowed, 658.

**SUCCESSOR**, of Justice in office, how determined in certain cases, 610.

**SUIT**, between husband and wife, 395, 397.

she may sue alone, when, 397.

when husband and wife are sued together she may defend in her own right, 398.

**SUMMONS**, to issue after filing complaint, 22.

how signed, 23.

to whom directed, 23.

to issue under seal, 23.

what to require and what to contain, 24.

to state relief demanded, 26.

what notice shall contain, 26.

how to be indorsed, 24.

how waived, 22.

summons how served, 29.

service of, by publication, when, 30.

return of service of, 28.

when publication of, ordered, 31.

copy of, when to be deposited in post-office, 31.

by whom, served, 28.

order of arrest may accompany, 77.

when issued in replevin, 99.

order of injunction may accompany, 113.

in attachment, 141.

in partition suit, 268.

in action against steamers, etc., 320.

may require joint debtors to show cause why they will not be bound by judgment, 368.

to describe judgment, 369.

to be accompanied by affidavit, 370.

defendant to answer, 371.

after service of, commission may issue, 428-432.

when, may be in Spanish, 646.

may issue against copartners under firm name, 656.

See **JUSTICES' COURTS ; RECORDERS' COURTS.**

**SUNDAY** to be excluded when last day, 530.

**SUPPLEMENTARY PROCEEDINGS** against the judgment debtor, 238-245.

See **JUSTICES' COURTS ; EXECUTION.**

**SUPREME COURT**, act organizing, p. 542.

Judges and terms of, p. 542.

jurisdiction of, p. 544.

may review any intermediate order on appeal, 344.

may reverse or modify judgment or remand cause, 345.

how appeals brought to a hearing in, 357.

appeals to, from District Courts, 347-358.

**SUPREME COURT, Continued.**

appeals to, from County Courts, 349-362.  
 Judge of, may order prisoner to be examined as witness, 412.  
 Clerk of, to send down *remittitur*, 358.  
 appeal to, from judgment, 465.  
 decisions of, to be in writing, 657.  
 may make rules, 643.  
 rules of, p. 611.

**SUPREME COURT CLERK, to copy points and authorities of parties appealing, 357.**

to certify judgment on appeal and send *remittitur*, 358.

**SURETIES, on same or separate instrument, may all be joined in one action, 75.**

on arrest, affidavit of, 76.  
 may be given and defendant be discharged from arrest, 81.  
 may surrender defendant, 82.  
 may arrest or cause defendant to be arrested, 83.  
 justification of, on release of defendant from arrest, 87.  
 qualification of, on arrest, 88.  
 may be examined as to property, 89.  
 to execute replevin undertaking, 102.  
 must justify, 103.  
 on undertaking to release property replevied, 105.  
 qualifications of, 106.  
 qualifications of, on indemnify bond to Sheriff, 109.  
 to undertaking attachment, 122.  
 defendant to give undertaking with two, in order to release attachment, 123.  
 on release of attachment may be sued, 134.  
 qualifications of, 137.  
 justification of, 137.  
 in attachment against steamers, 322.  
 in attachment on release of, 323.  
 on undertaking on appeal, 348-350, 352, 355, 356.  
 on release bond for contempt, 485.  
 on undertaking for costs, 512.  
 qualifications of, 513.  
 may compel party for whom they are bound to pay debt, 527.  
 justification of, in all cases, 650.  
 on writ of error, (Supreme Court Rules, No. 27) p. 615.

See JUSTICES' COURTS.

**SURGEON, not to be a witness in certain cases, 398.****SURPLUS MONEY on foreclosure to be paid to defendant, 247.****SURPRISE, Court may relieve a party from a judgment taken through, 68.**  
 which ordinary prudence could not guard against, ground for a new trial, 193.

See JUSTICES' COURTS.

**SURVEY, Court may allow, where claims to property are conflicting, 258, 259.**  
 of land in partition may be made, 276.**T****TAX, COURT, to be applied to pay salary of Judge, 509.****TENANTS, joint, in common, etc., may bring action for partition, 264.**

for less than ten years not to be affected by partition, 280.  
 whose estate has been sold to receive compensation, 290.  
 unknown, to be protected by Court, 292.

See PROPERTY, REAL; PARTITION OF REAL PROPERTY.

**TENDER, of money on redemption, 233.**

of money before suit brought, 506.

See JUSTICES' COURTS.

**TESTIMONY, may be taken down by Clerk, 663.**

of witness to be taken on postponement if required, 664.  
 when taken to be evidence subject to objection, 664.  
 of a witness may be taken by deposition, when, 428.  
 how taken by deposition, 429-431.

**TESTIMONY, Continued.**

- of witness out of the State when may be taken, 432.
- commission to issue to take, 433.
- how commission executed, 434-436.
- of a witness may be perpetuated, 437.
- proceedings to perpetuate, 437-442.

See **WITNESS**.

**THINGS IN ACTION**, assignor of, in certain cases not to be a witness for assignee, 4.

- action by assignee of, not to prejudice existing set-off, 5.

**THIRD PERSONS**, claim of, in replevin, 109.

- claim of, in attachment, 131.
- claim of, on execution, 218.

See **JUSTICES' COURTS**.

**TIME**, in which defendant may answer, 25.

- answer may be made by order of Court after, limited by act, 68.
- to file statement on motion for a new trial, 195.
- in which an appeal may be taken, 336.
- to file statement on appeal, 338.
- to file an undertaking on appeal, 348.
- may be enlarged for preparing statement on appeal, 340.
- to except to sureties on appeal undertaking, 355.
- within which to notify party's intention to be a witness, etc., 422.
- of notice for deposition, 429.
- of application for *mandamus*, 471.
- for arbitration to be fixed, 383.
- of service by mail, 522.
- computation of, in this act, 530.

**TOOLS** exempt from execution, 219.**TOWNSHIP**, in which, defendant to be held to answer, 535.

See **JUSTICES' COURTS**.

**TRANSCRIPT**, of judgment filed in other county to be a lien, 207.

- filing of, in Supreme Court, (Rule 2) p. 611.

**TRANSFER**, of place of trial, when made, 21.

See **JUSTICES' COURTS**.

**TREASURER**, may retain salary of officers in certain cases, 479.**TRESPASS**, actions for, 251.**TREES**, trespass in cutting, 251.**TRIAL**, of actions where, 18-21.

- of issue of facts not in pleadings, 3.
- when juror sick how, to proceed, 164.
- of action upon disagreement of jury, 169.
- by jury may be waived, when exceptions at, 188-191.
- of issue on *mandamus*, 472.

See **NEW TRIAL**; **PLACE OF TRIAL**; **EXCEPTIONS**.

**TRUSTEE**, of an express trust, who is, 6.

- may sue by himself, 6.
- claims against, may be joined, 64.
- Court may order money held by, to be deposited in Court, 142.
- appeal undertaking, in action by, 353.
- when, to pay costs, 507.

**U****UNDERTAKING**, effect of, on arrest, 76.

- justification of sureties on, 76.
- shall be filed with the Clerk of the Court, 76.
- on discharge from arrest, 81.
- disposition of, on arrest, 86.
- deposit to be returned on filing an, 93.
- on claim and delivery of personal property, 102.
- defendant may claim re-delivery of property on filing, 104.
- sureties on, to justify, 105.

**UNDERTAKING, *Continued.***

- qualifications of sureties on, 106.
- of indemnity in replevin to a Sheriff, 109.
- on attachment, effect of, 122.
- to release attachment, 123, 137.
- may be prosecuted, 134.
- of indemnity on execution to a Sheriff, 218.
- on injunction, effect of, 115.
- on release of judgment debtor, 239.
- on attachment of steamers, etc., 322.
- on release of attachment of steamers, etc., 323.
- on appeal to Supreme Court, 348, 356, 360.
- on appeal from judgment ordering delivery of personal property, 352.
- may be in one or several instruments, 354.
- to stay proceedings, how it must be, 349.
- to stay proceedings when judgment is for delivery or assignment, 350.
- to stay proceedings when judgment directs execution of a conveyance, 351.
- on appeal from judgment ordering delivery of personal property, 352.
- what shall be effect of, 355.
- on appeal from County Court, 360.
- on discharge from arrest for contempt, 485.
- for cost, by non-resident, 512.

See JUSTICES' COURTS.

**UNLIQUIDATED DEMAND, witness on assignment of, 4.**

- action by assignee of, 4.

**UNKNOWN, when defendant's name is, 69, 540.**

- when persons interested in real property are, 265.
- proceeds of sale of property belonging to, 300.

**USURPATION, of office or franchise, 310-316.**

See OFFICE.

## V

**VACATION, Courts may issue writs of *certiorari* and mandate in, 653.****VARIANCE, between the allegations and the proofs to be disregarded, 579.****VENIRE. See JURORS; JURY.****VENUE. See PLACE OF TRIAL; JUSTICES' COURTS.****VERDICT, what may be done in case of sickness of juror before, 164.**

- conduct of jury before reading, 166.
- jury may bring in sealed, 170.
- when jury have agreed upon, 171.
- may be corrected, 172.
- shall be read to jury, 173.
- shall be recorded, 173.
- may be either general or special, 174.
- what is a general or special, 174, 175.
- general, shall control special, 175.
- to establish amount, 176.
- to find value of property and damages, 177.
- what to be when plaintiff's right to real property is terminated, 256.
- against joint debtors to be for surplus, 373.

**VERIFICATION, of pleadings, when and how made, 51, 55.**

- of answer may be omitted, when, 52.
- form of, or substance of, 55.
- form of, on injunction, 113.
- complaint against steamer to be verified, 319.
- of statement on confession of judgment, 375.
- of memorandum of costs, 510.

**VESSELS. See STEAMERS, 317-332.****VIOLATION, of ordinance, suits for, 639.****VOLUNTARY APPEARANCE, gives Court jurisdiction, 35.**

- is equivalent to personal service, 35.

## W

- WAGES**, when not to be applied to the satisfaction of judgment, 243.  
 of mariners and seamen, to attach for, 329.
- WAIVER**, of summons, what is, 22.
- WARD**. See **INFANT**; **GUARDIAN**.
- WARRANT**, may issue against disobeying witness, 411.  
 may issue for a contempt, 482.  
 how executed, 484.
- WASTE**, actions for, 249-253.  
 to prevent, after sale on execution, 235.  
 to prevent, on appeal, 352.
- WIFE**. See **MARRIED WOMEN**; **SUIT**, 7.
- WITHHOLDING**. See **DETAINEE**, 64, 253.
- WITNESS**, when assignor shall not be, 4.  
 when assignor may be, 422.  
 on assignment of thing in action, etc., 4.  
 convenience of, ground for changing place of trial, 21.  
 may be examined on challenge to jurors, 163.  
 may be examined on challenge to referees, 186.  
 in proceedings supplementary to execution, 242.  
 may be examined on arbitration, 383.  
 before Sheriff's jury on claim of third persons to property levied on in execution, 218.  
 in general, who may be, 391-454.  
 all persons with certain exceptions may be, 391.  
 who shall not be, 382, 394.  
 what interest renders a person incompetent to be, 393.  
 adverse party may be, 394.  
 husband not to be, for or against wife, 395.  
 wife not to be, for or against husband, 395.  
 when attorney and counselor cannot be, 396.  
 when clergyman or priest shall not be, 397.  
 when licensed physician or surgeon shall not be, 398.  
 when public officer shall not be, 399.  
 Judge or juror may be, 400.  
 not understanding English may be examined by interpreter, 401.  
 manner of compelling attendance of, and their rights and duties, 402-416.  
 subpoena may require books, etc., to be brought by, 402.  
 cannot be compelled to attend out of his county more than thirty miles, 402.  
 what subpoena to require of, 403.  
 how subpoena served on, 404.  
 how subpoena served on, concealed, 405.  
 duty of, to obey subpoena, 407.  
 to answer legal and pertinent questions, 408.  
 may be required to answer as to previous conviction, 408.  
 disobedience of, to subpoena, 409.  
 how disobedience of, punished, 410.  
 liable for damages, 410.  
 failure of, to attend, Court may issue warrant, 411.  
 in jail or prison may be examined by deposition, 412.  
 may be produced in certain cases, 414.  
 to be exonerated from arrest, 415.  
 liability of officer arresting, 416.  
*examination of parties to an action*, 417-423.  
 to obtain a discovery, allowed, 417.  
 party to action may be examined as a, at instance of adverse party, 418.  
 testimony of, adverse party may be rebutted, 419.  
 if adverse party refuse to testify as, his pleadings may be stricken out, 420.  
 party in his own behalf may rebut, 421.  
 party in interest may be examined as, 422.  
 party to action may be, 422.  
 notice to be given that parties will be, 422.

**WITNESS, Continued.**

- when copartner may be, 423.
- testimony by deposition in this State*, 428-431.
  - when testimony of, may be taken by deposition, 428.
  - proceedings to have deposition of, taken, 429.
  - how deposition of, to be taken, 430.
  - depositions of, to be read after death of, 430.
  - deposition of, once taken can always be read, 431.
- testimony of, out of the State*, 432-436.
  - when deposition of, may be taken, 432.
  - testimony of, to be taken upon commission, 433.
  - deposition of, how taken, 434.
  - examined upon commission to be sworn, etc., 438.
  - deposition of, to be sealed and returned, 438.
- proceedings to perpetuate testimony of*, 437-442.
  - testimony of, may be perpetuated, 437.
  - how application made, 438.
  - how deposition taken, 439.
  - examination of, how conducted, 440.
  - deposition of, taken under this chapter when to be read, 442.
  - how sworn, 443-445.
  - form of oath to be administered to, 445.
  - may be examined on postponement of trial, 664.

See JUSTICES' COURTS.

**WOMAN**, how to sue and be sued, 7.  
married, when may sue alone, 7.

**WOOD**, trespass in cutting, 251.

**WRIT**, of execution. See EXECUTION.  
of attachment. See ATTACHMENT.  
of certiorari. See CERTIORARI AND REVIEW.  
of arrest. See MANDATE.

**WRITINGS**, miscellaneous provisions as to records and, 446-454.  
cases in which secondary evidence of the contents of, may be given, 447.  
party to explain alteration in, 448.

See RECORDS.

**WRONGS**, but one action for the redress or prevention of private, 1.



# ERRATA.

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Page 1—line first of No. 2, for "constructing" read "construing."

Page 36—line third of No. 2, for "Id." read "15 Cal. 418."

Page 37—line sixth of No. 8, for "denied" read "desired."

Page 51—line third of No. 21, for "isolated" read "violated."

Page 53—line first of No. 39, for "seoured" read "received."

Page 55—the doctrine stated under No. 65, is overruled. See No. 66.

Page 133—line first of No. 8, for "not" read "only."

Page 171—line second from the top, for "reasonable" read "recoverable;" and see 3 Cal. 216 and 13 Cal. 588.

Page 251—line fourth of No. 15, for "recorded" read "regarded."

Page 252—No. 85, for "Id." read "Loucks v. Edmondson, 18 Cal. 203;" and as to "Statement," see Sec. 338 and notes thereunder.

Page 279—line first of No. 4, for "1860" read "1850,"

Page 326—No. 83, for No. "183" read No. "141,"

To Sections Nos. 32, 223, 224, add "J. P."











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